No. 11134

In the United States Circuit Court of Appeals for the Ninth Circuit

R. E. Spaulding, L. B. Manlove and P. M. Manlove, Copartners, Doing Business Under the Firm Name and Style of Manlove & Spaulding Mfg. Co., appellants

v.

Douglas Aircraft Company (a Corporation), and United States of America, appellees

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF OF APPELLEES

INDEX

675786—45

TABLE OF CASES

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11134

R. E. Spaulding, L. B. Manlove, and P. M. Manlove, Copartners, Doing Business Under the Firm Name and Style of Manlove & Spaulding Mfg. Co., appellants

v.

Douglas Aircraft Company (a Corporation), and United States of America, appellees

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT

As appellants point out, the jurisdiction of this Court is established by 28 U. S. C. 225 and jurisdiction of the District Court by 28 U. S. C. 41. Each of the appellants is alleged to be a resident of Los Angeles [1] and appellee, Douglas Aircraft Company is a Delaware Corporation.[2] The amount in controversy exceeds $3,000.00, exclusive of costs and interests.[3]

Pursuant to a certificate from Judge Harrison,[4] the United States of America intervened in the action under the provisions of the Act of August 24, 1937 (28 U. S. C. 401) and of Rule 24 of the Federal Rules of Civil Procedure.[5]

STATEMENT OF THE CASE

On February 2, 1944, the Under Secretary of War, acting pursuant to the Renegotiation Act, determined that during the year ending December 31, 1942, appellants had realized excessive profits on war business in the sum of $110,000.00. A demand was made for a refund to the United States of that amount, less the appropriate tax credit.[6] During 1942, appellants manufactured and sold mechanical fittings and parts for airplanes,[7] and the full capacity of appellants' plant was directed to the production of materials which had a war end use.[8] Appellants' total sales for 1942 were approximately $405,000.00 and the profit on these sales, after payment of all expense except salaries to the partners, taxes and investments in the business, was $211,000.00, or a ratio of profit to sales of 52%.[9] The

[1] R. 2.
[2] R. 3.
[3] R. 3.
[4] R. 19.
[5] R. 35.
[6] R. 7.
[7] R. 234.
[8] R. 233.
[9] R. 211.

675786—45——1

Under Secretary reduced the profit to $100,000.00, making a ratio of profit to adjusted sales (total sales reduced by $110,000.00) of 33%. Each of the three partners, therefore, received for his year's work $33,000.00 after renegotiation. On this $33,300.00 each partner, like all other persons, paid taxes.

The order of the Under Secretary recites that it was made after consideration of financial, operating and other data submitted by appellants or obtained from other reliable sources, and after appellants had been granted full opportunity to submit additional information and to present such contentions as they deemed material at hearings of which due notice was given.[10]

On February 25, 1944, the Renegotiation Act was amended (Title VII of the Revenue Act of 1943) to provide that appellants were entitled to a redetermination *de novo* of the amount of their excessive profits by the Tax Court of the United States. Appellants did not seek that redetermination [11] and the period for filing a Tax Court petition has expired. Accordingly, the order of the Under Secretary has become final and is now beyond attack.

An order determining the amount of a contractor's excessive profits is not self-executing and the statute (§ 403 (c)) describes the methods by which the Government may make collection. They are: (a) by an affirmative suit, (b) by set-off, and (c) by the issuance of withholding orders, that is, orders from the Government to prime contractors instructing them to hold for the account of the United States amounts which would otherwise be payable to the contractor. Such an order was issued to Douglas[12] and pursuant to that instruction Douglas withheld for the account of the United States $27,580.80.[13]

The Renegotiation Act became law on April 28, 1942. During the balance of the year and charged with knowledge of the statute, appellants continued to bid for and accept work and to enter into agreements subject to the Act.[14] Furthermore, on November 14, 1942, appellants agreed in writing to certain so-

[10] R. 7.
[11] R. 218.
[12] R. 9.
[13] R. 219.
[14] R. 233.

called special conditions which provided, in effect, for renegotiation.

Under these circumstances, Judge Harrison concluded: (a) that appellants had agreed to renegotiation and that the constitutionality of the statute was therefore immaterial; (b) that appellants were estopped from challenging the constitutionality of the statute; and (c) that, in any event, since the Renegotiation Act related to the expenditure of public funds, no case or controversy justiciable by the courts was presented in this litigation. The motions of defendant Douglas and the intervenor, the United States of America, for summary judgment were granted.

ARGUMENT

Estoppel

The court below decided that the conduct of appellants has been such that they may not now contend that their excessive profits are not subject to recapture under the Renegotiation Act. That decision was not necessarily based, as appellants seem to believe, on a finding that appellants with respect to every purchase order and every dollar of excessive profits had agreed to renegotiation. It was based, as any such decision is always based, on a consideration of appellants' conduct in its entirety. That conduct, Judge Harrison concluded was, *in general*,[15] so thoroughly inconsistent with appellants present position as to compel the court to refuse relief. The Renegotiation Act was passed on April 28, 1942 and appellants, charged by that statute with notice that the Government would require a refund of excessive profits on war business, nevertheless continued to bid for and accept that business. Now, having reaped from that business and at public expense not only a normal profit but a profit obviously excessive, appellants seek to repudiate the condition to which they agreed by accepting the business, that is, the refund of excessive earnings. That Judge Harrison should have found this position indefensible is scarcely surprising. Furthermore, the warning of the statute that a refund would be required was implemented by the letter

[15] Emphasis supplied throughout this brief.

of September 14, 1942, from Douglas to appellants directing specific attention to the refund obligation and saying in part: [16]

> Section 403 requires us to insert a renegotiation clause in each subcontract involving more than $100,000, and the provisions of some of our more recent contracts define "subcontract" as including practically everything we buy. Furthermore, we suspect that we should insert it in each purchase order, since the total orders to any firm under a given contract may aggregate more than $100,000. Therefore, we believe that, for safety's sake, we should insert a clause in every purchase order. It is much simpler to do this by means of a blanket agreement than by attaching the clause to each order. Hence we are enclosing two copies of such a blanket agreement, with the request that you execute one and return it to us.

On November 14, 1942, appellants signed and sent to Douglas the form agreement.[17]

This exchange of correspondence Judge Harrison found to be a contract by appellants to refund to the United States excessive earnings in the amount determined by the Secretary of War, and in view of this contractual obligation Judge Harrison concluded that the constitutionality of the statute was immaterial. Appellants seek to escape this conclusion by pointing out that although the Renegotiation Act reaches all contractors whose aggregate sales for the fiscal year 1942 total $100,000, the statute required that an express renegotiation clause be inserted only in subcontracts which individually are in an amount in excess of $100,000.[18] Appellants had no such

---

[16] R. 25.

[17] R. 27: "We hereby agree that Special Conditions 42 and 42A printed on the reverse side hereof shall be applicable to all purchase orders which you issue to us under Army and Navy contracts respectively; provided, however, that this agreement shall cover only purchase orders in which you are required by law or by contract to insert such Special Conditions, and shall continue only so long as such requirement may be effective."

[18] The provision requiring the insertion of an express renegotiation clause in contracts in an amount in excess of $100,000 is purely procedural and it does not define or purport to define which contracts are renegotiable. The plain words of the statute make it clear that *any* contract or subcontract on

contracts. This argument, however, completely fails to meet Judge Harrison's propositions. The decision below was obviously based not only on appellants' written agreement to accept renegotiation but also on the fact that appellants bid for and accepted renegotiable business after April 28, 1942. Furthermore, it is by no means clear that the agreement expressed in the correspondence did not bring about the inclusion of an express renegotiation clause in every purchase order, regardless of amount. That Douglas so intended is made plain by the letter of September 14, 1942: [19]

> Therefore, we believe that, for safety's sake, we should insert a clause in every purchase order.

It was this proposition which appellants accepted on November 14. Furthermore, the proviso in the letter of November 14, stated that the special conditions were to be included in all subcontracts where those conditions were required either by law or by *contract*. What contractual obligations Douglas may

---

which excessive profits are realized is subject to renegotiation. Section 403 (c) says:

"* * * whenever in his opinion excessive profits have been realized, or are likely to be realized, from *any* contract with such Department or from *any* subcontract thereunder,"

This is confirmed by the provisions of § 403 (c) that the subsection "shall be applicable to *all* contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, *whether or not such contracts or subcontracts contain a renegotiation or recapture clause*, * * *."

The provision limiting the requirement for express renegotiation clauses to contracts in excess of $100,000 was obviously designed to reduce the administrative burden of inserting express clauses in the contracts.

That renegotiation of any contract is authorized, regardless of its amount, is confirmed by the legislative history of the Act. The War Department issued on August 10, 1942, a statement entitled "Principles, Policy and Procedures to be Followed in Renegotiation." That statement, on page 9, unequivocally states that renegotiation of all contracts is authorized and it was in the light of that statement that the statute was amended and reenacted on October 21, 1942. Subsection (b) of the October amendments continued to require the insertion of a renegotiation clause in each contract in excess of $100,000. Subsection (c) authorized the renegotiation of any contract, and Subsection (c) (6) (iii) was added providing for exemption from renegotiation of any contractor whose contracts did not in the aggregate exceed $100,000. The amendments were made effective as of April 28, 1942, the date of the original Act. The amendments of October 21, 1942, were passed, of course, long prior to the renegotiation of appellants' business.

[19] R. 25.

have had to insert express renegotiation clause in purchase orders is not shown by the record, except by inference from the Douglas letter of September 14 stating that the clause was to be inserted in each order. It is submitted that on this state of the record the trial judge was entitled to conclude that the parties intended that a renegotiation clause be included in every purchase order regardless of its amount.

Nor do appellants escape the force of the decision below by pointing out that their 1942 business was not done with Douglas alone. The estoppel does not depend upon the assent of appellants to every aspect of renegotiation nor upon an express agreement by them to refund every dollar of excessive earnings. The estoppel is made out by demonstrating that considered in its entirety appellants' conduct has been such that they may not now, in justice and fairness, refuse to refund their excessive earnings. And the question for decision, therefore, is not whether appellants can demonstrate that there was no express argument on their part for renegotiation of some portion of their business; the question for decision is: May appellants who after April 28th and throughout 1942 bid for and accepted business on the understanding expressed in the statute that a refund would be made of excessive earnings and who agreed in writing to a refund of at least part of those earnings, repudiate the condition which they accepted and the agreement which they signed and demand that the Court obtain for them every cent of their excessive and unconscionable profits? To this question Judge Harrison answered "No."

The decision below finds abundant support in the precedents. It is supported, for example, by the principle that the Federal Courts will not act in aid of a manifest injustice or in a manner contrary to the public interest. *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488, 492 (1942);[20] *Johnson* v. *Yellow Cab Co.*,

[20] "It is a principle of general application that courts, and especially courts of equity, may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest. *Virginian Ry. Co.* v. *Federation*, 300 U. S. 515, 552; *Central Kentucky Co.* v. *Railroad Commission*, 290 U. S. 264, 270–73; *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 337–38; *Beasley* v. *Texas & Pacific Ry. Co.*, 191 U. S. 492, 497; *Securities & Exchange Comm'n* v. *U. S. Realty Co.*, 310 U. S. 434, 455; *United States* v. *Morgan*, 307 U. S. 183, 194" (p. 492).

321 U. S. 383, 387 (1944). To permit appellants to retain their excessive profits after having bid for and obtained their business in the face of the statute is so manifestly unfair as to preclude a Federal Court from granting any aid to them. The relief demanded by appellants would not only be unjust but it "would make the Court the instrument of this injustice." *Thomas* v. *Brownville R. R. Co.*, 109 U. S. 522, 526 (1883).

Furthermore, it is well settled that constitutional rights may be waived, *Pierce Oil Co.* v. *Phoenix Refining Co.*, 259 U. S. 125 (1922), and an estoppel to urge constitutional rights frequently arises from conduct inconsistent with their assertion. *United Gas Co.* v. *R. R. Comm'n*, 278 U. S. 300 (1929); *Wall* v. *Parrott, Silver & Copper Co.*, 244 U. S. 407 (1916). It is well settled for example, that one who received the benefits of a statute may not challenge its constitutionality. *McKinney* v. *Carroll*, 12 Pet. 66, 70 (1838); *Grand Rapids & Indiana Ry. Co.* v. *Osborn*, 193 U. S. 17, 29 (1904); *Kansas City, Memphis & Birmingham Ry. Co.* v. *Stiles*, 242 U. S. 111, 117 (1916); *Hurley* v. *Commissioner*, 257 U. S. 223 (1921); *St. Louis Co.* v. *Prendergast Co.*, 260 U. S. 469 472 (1923); *Buck* v. *Kuykendall*, 267 U. S. 307, 316 (1925); *Booth Fisheries* v. *Industrial Comm.*, 271 U. S. 208 (1926); *Frost* v. *Corporation Commission*, 278 U. S. 515, 527 (1929); and see *Shepard* v. *Barron*, 194 U. S. 553 (1904).

This rule might well be given full application here. The Renegotiation Act is not an isolated statute having no relation to other acts of Congress; it is an integral part of the congressional program for war and particularly a part of the war procurement program. The renegotiation provisions first appear not as an independent act but as Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942. That Act appropriated approximately $15,000,000,000 for military purposes and it might well be that appellants received payment for their 1942 business from this very appropriation. In any event, since appellants during 1942 did war business almost exclusively, appellants certainly received the benefit of the Government war procurement program, and plainly the statutory provisions for renegotiation are part of that program. On this analysis, the cases cited are more than highly per-

suasive analogies; they are clear and controlling precedents. And even if appellants could escape these decisions they would be defeated by the general rule that one may not repudiate the burdens of a transaction after having accepted its benefits [21]—appellants having accepted renegotiable business and benefited thereby may not now repudiate the burden of refunding that portion of their profits determined to be excessive.

Judge Harrison held, as an independent ground for his decision, that the question of the constitutionality of the Renegotiation Act was not a controversy justiciable by the courts. In reaching this conclusion, he cited and relied on *Perkins* v.

---

[21] The rule that one may not repudiate the obligations of a transaction from which he received the benefits is applied in a great variety of circumstances.

Young v. *Clarendon Township*, 132 U. S. 340, 355 (1889): "The company knew the statute—was held by the law to know and understand it. It contracted with the township through the statute, and could so contract with it in no other way. Availing itself of the statute, it must take it *cum onere*."

Lindsay and Phelps Company v. *Mullen*, 176 U. S. 126, 151 (1899): "At any rate, if this plaintiff wanted to take advantage of the conveniences furnished by the boom, it is not in a position to avoid compliance with these provisions of the statutes of the State which authorized the construction of the works."

Grand Rapids & Indiana Ry. Co. v. *Osborn*, 193 U. S. 17, 29 (1904): "Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of existing laws regulating rates of fares upon railroads, and it is estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body."

American Railway Express Co. v. *Lindenburg*, 260 U. S. 584, 592 (1923): "Having accepted the benefit of the lower rate dependent upon the specified valuation, the respondent is estopped from asserting a higher value. To allow him to do so would be to violate the plainest principles of fair dealing."

St. Louis Co. v. *Prendergast Co.*, 260 U. S. 469, 473 (1923): "It is enough for our action that the court considered plaintiff estopped to contest the validity of the tax which was imposed by connecting its premises with the sewer. In that conclusion we concur."

Walker v. *Gish*, 260 U. S. 447, 452 (1923): "In using it, he waived the right to object to the regulations with which he complied without objection, until he was called upon to pay his share of that which he had taken and used."

Magee v. *United States*, 282 U. S. 432, 434 (1931): "The taxpayer benefited by the claim and is not in a position to contest its legality."

International Contracting Company v. *Lamont*, 155 U. S. 303, 310 (1894): "A party cannot avoid the legal consequence of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences."

Maricopa & Phoenix Railroad v. *Arizona*, 156 U. S. 347 (1895); *Wilkes* v. *Dinsman*, 48 U. S. 88 (1849).

Lukens Steel Co., 310 U. S. 113 (1940). The Supreme Court there held that the United States, like any private person, may state the terms upon which the business for which it pays must be done and that no court is entitled to interfere with or to pass judgment upon those terms. The steel companies contended that the terms which the Secretary of Labor proposed for Government contracts were unauthorized by the Public Contracts Act. The Court of Appeals for the District of Columbia agreed and issued an injunction against the Secretary. The Supreme Court reversed, pointing out, first, that any failure of the Secretary to follow the instructions of Congress was a matter exclusively for the attention of Congress, and, second, that the Government traditionally had full power, free of judicial interference, to fix the terms upon which it would conduct its business:

> *Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.*
>
> * * * * *
>
> *This Act's purpose was to impose obligations upon those favored with Government business* and to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment.
>
> * * * * *
>
> *We find nothing in the Act indicating any intention to abandon a principle acted upon since* the Nation's *founding under which the legislative and executive departments have exercised complete and final authority to enter into contracts for* Government purchases (pp. 127–128).

If by the Public Contracts Act the Government can state, free from judicial restraint, the conditions upon which it will make purchases, it is difficult to believe that the Government may not by the Renegotiation Act state the condition, that is,

refund of excessive earnings, upon which war business may be done. A contractor engaging in war business took that business with the burden and the duty of making the refund demanded by the law. No court can be asked to tolerate the contention that a contractor, who accepted the obligations of the statute by accepting war business and who realized excessive earnings, can now defend his excessive profits by urging the invalidity of the Act.[22]

The circumstances of this case are, it is submitted, more than sufficient to justify the decision below granting appellees' motion for summary judgment. If, however, this Court were to conclude that Judge Harrison was wrong in deciding that appellants have no standing to challenge the Renegotiation Act, the decision below is nevertheless correct for the reason that the Renegotiation Act is in all its aspects constitutional.

The Renegotiation Act

The importance of the Renegotiation Act to the nation's taxpayers cannot be overstated. Pursuant to this statute, refunds to the United States of excessive war profits have been made in an amount, prior to tax credit, of more than $6,000,000,000.[23] Renegotiation, furthermore, served as an integral feature of the program which brought success in the war. Appellants now propose that this program be repudiated by the courts and that the claim of profiteers for excessive and sometimes scandalous war profits be allowed against the taxpayers.

War brought to the United States the problem of mobilizing every resource of the nation toward a single objective, the unconditional surrender of Germany, Italy, and Japan. Success in attaining that objective depended on success on many fronts: on success in the acquisition and allocation of mate-

---

[22] On this record it is clearly permissible to conclude that no contract of appellants made subject by the Under-Secretary to renegotiation was executed prior to April 28, 1942. The allegation of the complaint (R. 6) that all of appellants' 1942 business was the subject of the order of the Under Secretary was denied (R. 23, 44). No finding was made and no evidence was presented as to the date of appellants' subcontracts. Compare the assertion of appellants' brief, p. 22:

"Besides, there is no proof that defendant placed any orders with plaintiffs between November 14, 1942 and January 1, 1943."

[23] Hearings, Committee on Ways and Means, House of Representatives, 79th Cong., 1st Sess., on H. R. 2628; Statement of Hon. Robert P. Patterson, Under Secretary of War, p. 15.

rials, in the distribution and skill of the labor force, in the control of prices, in arranging Government finance, in maintaining morale, in avoiding inflation, in developing new weapons of war, in mass production of supplies and equipment and, ultimately, in the size and power of the fighting forces. There was on December 7, 1941, no single plan ready at hand by which all this could be achieved and no single plan was ever developed. There was, instead, a series of plans and a series of policies knit together to make an operating program sufficiently integrated and at the same time sufficiently flexible to permit the nation to achieve victory.

The outline of this program can be found in the acts of Congress. The Selective Service Act provided the mechanics for obtaining men. It also placed authority in the procuring agencies to issue mandatory production orders and, as a last resort, the President was authorized to take over and operate production facilities. The Revenue Act provided funds for maintaining the military establishments and by taxation helped to absorb consumer purchasing power which might otherwise have disrupted the economy. Rationing and priority orders issued pursuant to the Second War Powers Act regulated the flow and controlled the use of critical materials. The Emergency Price Control Act steadied the business structure of the nation by price regulation. The War Labor Board adjusted labor disputes and maintained appropriate wage levels. Appropriation bills allocated funds for the purchase of weapons and supplies. And the Renegotiation Act operated to maintain morale, reduce the tax burden, stimulate efficient production and eliminate war profiteering with its attendant evils. It is within the framework thus provided by acts of government that the war was fought.

The attacks upon that framework have been notably unsuccessful. Congress resisted every attempt to repeal or emasculate war legislation, and indeed the tendency was to strengthen that legislation at every sign of weakness. Attacks through the courts have been equally unavailing. The authority to control prices, the authority to allocate materials, the authority to take over war production facilities, the authority to draft men are now sustained beyond possibility of doubt. Here the ques-

tion is the authority to renegotiate war contracts and to recapture excessive war profits. It is submitted, and the Government believes the Court will conclude, that the war power of the Federal Government, including as it does power over facilities, materials and men, is sufficiently broad to place power over profits beyond question. The Constitution has not heretofore been read to defeat the national program for war. It should not be so read in this case.

The reasons assigned by appellants for the conclusion that the Renegotiation Act is unconstitutional are not impressive. It is argued that the statute unlawfully delegates legislative power to executive officials—but the statute provides standards more than adequate under the Constitution and, in any event, the very detailed standards adopted by the administrative officials have been ratified and adopted by Congress. It is argued that renegotiation takes appellants' property without "just compensation" and that there is an unlawful failure to provide for a court determination of the amount of such "just compensation"—but renegotiation is not an exercise of the power of eminent domain; it is an exercise of the regulatory power of Congress to control war profiteering, and appellants' property, voluntarily delivered to Government contractors, has not been "taken" by the Government or by any one else. It is argued that renegotiation impairs the obligation of contracts—but renegotiation in operation does not modify contract prices; it only recaptures by administrative action excessive profits on total war business. It is argued that the statute is void because it does not require administrative findings and that the order is void for the lack of adequate findings—but no court has ever held that a statute must require administrative findings and this Court has expressly ruled that the absence of findings does not affect the validity of an administrative order. It is argued that the order was unlawfully based on secret data and that the statute is unlawful because it contains no express provision for notice and hearing—but appellants, having failed to avail themselves of the opportunity for *de novo* hearing and redetermination in the Tax Court, are in no position to complain even though their contentions were

otherwise valid, which they are not. And finally, it is argued that the Act unlawfully abrogates contracts between private individuals—but there has, as a matter of actual fact, been no interference with or modification of appellants' contracts and, in any event, the power of Congress to modify such contracts in the public interest is beyond dispute.

THE STATUTE

The determination of excessive profits before the Court is a determination of excessive war profits realized during the calendar year 1942. The statute which authorizes this determination is the Sixth Supplemental Appropriation Act, 1942, which became law April 28, 1942, as amended by the Revenue Act of 1942, which became law October 21, 1942.

Section 403 (a) of the Sixth Supplemental National Defense Appropriation Act, 1942, defines department to mean the War Department, the Navy Department, the Treasury Department, and the Maritime Commission.

Section 403 (b) directs the Secretaries of the departments to insert in department contracts provision for renegotiation of the contract price, provision for retention by the United States of excessive profits or repayment of such profits to the United States, and a provision requiring prime contractors to insert similar clauses in subcontracts.

Section 403 (c) directs the Secretaries to require renegotiation of contract prices; directs elimination of excessive profits realized under such contracts either by reductions in the contract price, or by withholding payments otherwise due the contractor, or by directions to prime contractors to withhold for the United States sums otherwise due a subcontractor, or by court actions brought on behalf of the United States; provides for tax credits; authorizes final agreements between the Government and the contractor; provides periods of limitation; and provides that the section shall be applicable to all contracts and subcontracts, regardless of the presence or absence of a renegotiation clause, except those as to which final payment had been made prior to April 28, 1942, or which are specifically made exempt.

Section 403 (d) directs the Secretaries to disallow unreasonable salaries and unreasonable reserves in determining excessive profits and permits the use of the subpoena power provided by Title XIII of the Second War Powers Act.

Section 403 (e) authorizes demands for additional information; section 403 (f) provides for delegations of authority; section 403 (g) is a separability clause; and section 403 (h) provides for expiration of the statute.

Section 403 (i) exempts contracts between governments and their agencies and contracts for the products of mines, oil wells and timber tracts; and authorizes exemption, if the Secretaries see fit, of contracts to be performed outside the United States, contracts under which profits can be determined with reasonable certainty when the contract price is established, and portions of contracts if the provisions of the contract are otherwise adequate to prevent excessive profits.

Section 403 (j) is a technical provision relating to Government personnel.

The statute is so phrased that only war contracts and the profits realized from war business are affected by its provisions; the ordinary commercial agreements of the contractor and the profits from such agreements remain undisturbed by renegotiation.

On February 25, 1944, the Renegotiation Act was amended and reenacted by Titles VII and VIII of the Revenue Act of 1943. Section 403 (e) (2) of the amended statute specifically provided that contractors such as appellants should be entitled to de novo redetermination in the Tax Court of the amount, if any, of their excessive profits.

The text of original statute and all amendments are furnished to the Court with this brief.

A

The procurement problem and the necessity for renegotiation

The attack on Pearl Harbor brought to the United States a procurement problem of gigantic proportions. In the months following December 7, 1941, the industrial capacity of the nation was converted to the production of war materials and to meet war objectives. Speed was the first consideration. Too

little and too late had lost France and half of Russia, forced England to a last ditch stand and permitted Japan to take an empire reaching from the Aleutians to Singapore and Sumatra. It was only too plain that the failure of the United States to arm for war more rapidly than any nation had ever armed for war was likely to be the last and fatal mistake.

1. The volume of contracts

The public will to provide what the nation required was beyond question, but United States industry is geared to produce for profit and in response to a commitment to pay in dollars for the goods produced. This meant that for every piece of equipment, for every gun or ship or tank, for every item of supply right down to the last boot lace in the last boot, there had to be at least the form of an agreement whereby the purchaser, ultimately the United States, undertook to pay for what was produced. Procurement therefore could proceed no faster than contracting. In January 1942 contracts let for war purposes totalled in dollar volume over $9,000,000,000 and during the four months of July through October, the War Department alone executed over 1,400,000 contracts. The Navy during the last six months of 1941 committed by contract $6,000,000,000 and actually expended about $2,800,000,000. For the first six months of 1942 the figures jumped to $17,200,000,000 in commitments and $6,200,000,000 in actual expenditures. So rapid was the rate of contracting that on June 30, 1942, the outstanding obligations of the United States for war purposes amounted to nearly $43,000,000,000. The total expenditures of the War and Navy Departments for the fiscal year ending on that date, amounting to nearly $23,000,000,000, exceeded the total military and naval expenses of the United States from 1789 through the end of the World War.[24]

2. Modification of traditional procurement procedure

There was, of course, neither in the War or Navy Departments nor anywhere else a mechanism for handling this volume of contracts with any degree of care or precision. Purchasing

[24] Patterson affidavit, par. 12 (R. 57); Hensel affidavit, pars. 9–12 (R. 134–140).

which during peacetime was scattered through thousands of customers was suddenly centered in the United States. The result inevitably was confusion—confusion, however, from which order had to be established in the shortest time possible.

The traditional method of purchase by the United States is based on competitive bidding. Detailed specifications are drawn up, circulated through the trade and advertised. Bids are submitted and on a named date the bids are opened. The award is made and the low bidder is so advised. The contract is drawn, a performance bond is posted, and production then begins. This procedure, admirably adapted although it may be to protect the public interest in the purchase of office supplies or in constructing a post office, was completely useless as a method of directing the entire national production to war objectives. By the First War Powers Act of December 18, 1941, Congress confirmed and greatly extended the practice, begun in 1940, of direct negotiation between the Government and the supplier. In March 1942 this method was established as the method to be followed by procurement officials in the absence of express instructions to the contrary and broad authority was given to field offices to conclude final agreements.[25] But even direct negotiation was not fast enough to meet the demands of the early war period. A procurement contract, like any contract, requires agreement on all its terms and the war would not wait while that agreement was obtained. The Services devised, therefore, methods for obtaining production while negotiations were still in process. These methods included the letter of intent and to some degree the letter contract and letter purchase order.[26] The letter of intent is no more than advice to the contractor that it is contemplated that an order will be placed with him at terms to be agreed upon and requesting that he begin immediately with such plant conversion, retooling, etc. as may be necessary. It is agreed that he will be protected against loss if no final arrangement is made. The letter contract and letter purchase order are slightly more formal but at best these devices, and particularly

[25] Patterson affidavit, par. 17 (R. 67).

[26] Patterson affidavit, par. 18 (R. 68) ; Hensel affidavit, par. 12 (R. 139).

the letter of intent, are only stop-gap expedients designed to advance, to the extent possible, the all important delivery date. Ultimately, however, the contracting officer and the supplier must negotiate a complete contract and all too frequently there was in the last analysis not even the most tenuous basis for that negotiation.

3. The difficulties of procurement contracting [27]

(a) *New weapons and supplies.*—The War in Europe demonstrated the striking power of a mechanized force. The war in Asia obviously required amphibious operations. The development of air power demanded wholesale revision in traditional combat techniques. This meant that many weapons and supplies, never before produced except as laboratory models had to go immediately into mass production. Radar equipment and Bofors and Oerlickon guns are three examples among many. For such articles, neither the contracting officer, nor any contractor or supplier had either production or cost experience. The future would disclose the problems, and, it was hoped, provide the solutions.

(b) *Modifications of specifications and design.*—The situation with respect to weapons which had been produced in substantial quantities prior to 1941 was scarcely less difficult. The rapid development of combat technique and the rigid test of performance under fire produced a never ceasing flow of change orders and modifications in design. It was pointed out to the House Naval Affairs Committee, for example, that during the construction of a single destroyer, 2,000 change orders had been issued.[28] Cruisers were changed to carriers midway in construction. The armament and design of battleships, after the loss of the *Repulse* and the *Prince of Wales,* were radically altered to withstand air attack. Techniques were worked out for increasing fire power, and gun specifications were modified accordingly. Increased fire power, in turn, required heavier and more resistant armament. The course of war and victory

[27] Patterson affidavit, pars. 14–16 (R. 59–66) ; Hensel affidavit, pars. 15–68 (R. 142–171).

[28] "Legislative History of the Renegotiation Act," par. IV (2), p. 53.

itself demanded that existing procedures be constantly modified. Each campaign was in large measure a separate procurement problem. What was intended for North Africa had to be radically altered if it was to be used in the Solomons.

(c) *Increased volume.*—The volume of production demanded of American industry and of each supplier was totally unlike anything within experience. What this might mean in terms of cost and price could only be a matter of speculation. Production lines built for mass output frequently work cost miracles—but not always. And no supplier could fairly have been asked to accept in his 1942 contract a price based on a cost figures as low as might be hoped for when optimum volume was achieved. This was particularly true because of the unresolved and crucial problems of labor and material supply.

(d) *Labor problems.*—In the early months of 1942 it was apparent that the United States was about to take from the very center of the nation's labor force an army of unprecedented size. That this would disrupt the supply of trained labor was clear enough but what the exact consequence would be for any individual plant or for any individual operation was beyond prediction. No one could say how soon, how successfully, or from where a substitute labor force could be obtained and even when the men were found there would remain in almost all cases the problem of training them to work together efficiently. In many instances that training had to be in terms of techniques for the production of new weapons, techniques more or less unknown to management and labor alike. What wage levels would be maintained was equally difficult to estimate. War always means inflation, the extent of which appears to depend almost entirely on the efficacy of control. The degree of success that would be achieved in the control of inflation was unknown.

(e) *Material costs and supply.*—The uncertainties which confronted the contractor with respect to materials were, if possible, even greater than those he faced in connection with labor. One thing, however, was obvious—the supply of strategic materials was not sufficient to satisfy all purposes. A priority plan would have to be devised, but how quickly it would appear, how well it would work, who would receive what and in what

amounts, no one knew or could know. Every plan for a production line was made conditional and to some degree speculative by the fact that the essential materials might not be available and, if once available, might at any time be diverted to a more urgent need. It was plain, too, that for some critical items wholesale substitution would have to be made and that for others, even for commodities as basic as steel, substitutes would have to be used wherever possible. What the substitutes might be and what they might cost remained to be seen.

To these major difficulties was added a host of minor problems such as the availability of adequate financing, the availability of tools and production equipment, the cost of conversion, the disruption of transportation and many other factors which for each particular contractor were of greater or lesser significance.

All these risk factors were legitimate problems on which the Government and the supplier had to reach agreement. The result in most cases was a fluid contract which in the last analysis did little more than commit the contractor to use his best efforts to produce and the Government to pay for the production.[29] To protect the public against the more obvious hazards, such as that of purchasing useless products, provision was made, first, that specifications could be changed at the will of the Government, and, second, that if the Government so desired the contract could at any time be entirely terminated. Various termination clauses were developed in an attempt to protect contractors against loss in the event of cancellation or cutbacks of orders. Provision was also made for Government inspection of the supplies and to a limited extent there was a guarantee by the contractor of quality.

On the contractor's side a variety of clauses were included to assist production and to minimize risk of loss. Liberal provision was made against damage claims for unavoidable delays. Advance payments under the contract were frequently authorized and partial payments were made as goods were delivered. The contractor was often empowered to purchase at Government expense necessary tools and machines and make other

[29] Patterson affidavit, par. 19 (R. 72); Hensel affidavit, pars. 102–122 (R. 198–208).

plant installations. As protection against drastic increases in labor and material costs, escalator clauses were included. These clauses provided for automatic increases in the contract price to keep pace with advances in a designated index of national wage rates or material prices. This was at best an unsatisfactory arrangement for the obvious reason that the cost of the particular item might rise much more rapidly or much more slowly than any statistical index.

4. The impossibility of accurate pricing; the policy of pricing on top of the contingencies; the accumulation of excessive profits [30]

Of all the problems of procurement contracting, the price problem was by all odds the most difficult. Every uncertainty, every change of circumstance, necessarily affected the figure that constituted a fair price. A change in specifications demanded another price. Increased labor costs fairly required new prices. Production lines stopped because of material or labor shortages; again a price adjustment was in order. On the other hand, the successful training of labor, the establishment of satisfactory supply lines, the development of new and more efficient manufacturing techniques, the achievement of mass production, the solution of conversion problems—all these countervailing factors could also fairly be said to require price adjustment. Under the circumstances prevailing in a war economy neither the importance nor the effect on price of a single one of these items could be accurately predicted and certainly no prediction at all could be made as to the net price result of these various and conflicting forces.

This price problem was never entirely solved, but a procedure was early adopted to meet it. Two things were done: first, price was made a consideration secondary to the production of weapons and supplies in the time and in the quantities needed for military purposes, and, second, a price policy was adopted which permitted the contractor to bid on top of the contingencies, that is, to place his price at a point which would provide protection for him against current and foreseeable hazards to production. It was recognized, of

[30] Patterson affidavit, pars. 14–18 (R. 59–68); Hensel affidavit, pars. 15–68 (R. 142–171).

course, that with respect to any given contractor not all of the anticipated difficulties, and indeed perhaps none of them, would ever materialize. This policy meant inevitably the realization in many instances of excessive and sometimes scandalous profits, and producers and purchasers alike recognized that good faith dealing would require a price adjustment in the light of actual production experience. Renegotiation is the contemplated price adjustment.

The effect of this price policy, adopted to speed deliveries and meet in time the demands of the Services for weapons and supplies, is illustrated by the experience of various purchasing bureaus of the Navy Department.[31] The total contract price on a group of thirteen contracts executed during 1940 and 1941 by the Bureau of Ships was approximately $750,000,000; total actual cost was about $515,000,000 and the profit, absent renegotiation, would therefore have been 45.7% of cost. This is without regard to the provision for escalation which, had it been given effect, would have added an additional 15% of profit. Early in 1942 the cost of a destroyer escort was estimated at $3,300,000; actual cost varied from $1,500,000 to $2,500,000 and under one contract which fixed the price at $3,500,000 the cost was $1,800,000, or a profit in the absence of renegotiation of 93.4%. A manufacturer holding a contract for 200 destroyer turbines produced the first turbine at a cost of $2,559,000; the cost of the sixteenth turbine was about $607,000.

The Bureau of Ordnance had a similar experience. The Oerlickon gun (20 mm.) with one type of mount was manufactured under a contract made in September 1941 at a price of $7,531.42 per gun; under a contract dated in January 1943 the price was $4,519.97. With another type of mount, a contract signed in September 1942 specified a unit price of $6,330; a later contract dated May 1944 brought the price down to $3,666. The same type of gun was made without mounts under a contract dated June 8, 1942, at a unit price of $4,968.50; a contract dated May 5, 1944, specified a unit price ranging from $2,133 down to $1,708 as production increased.

[31] Hensel affidavit, pars. 40–68 (R. 157–170).

The original contract made for Bofors guns (40 mm.) dated January 7, 1942, named a price of $4,288 (without mounts); a contract of November 11, 1943, brought the price down to $2,510.

The Bureau of Aeronautics, placing in most cases cost-plus-a-fixed-fee contracts, estimated in March 1942 for one type of plane a unit cost of $100,000; the unit price was redetermined at $58,000. Another contract made in May 1942 estimated the unit cost of a fighter frame at $63,000; a later contract called for a unit price of $39,000. Similar results were achieved in reducing costs of engines and propellers. These examples could be multiplied indefinitely.[32]

By April 1942 the evidence of excessive profits realized under contracts placed during the National Defense Program had accumulated to the point that it was evident to Congress that some national program to cope with the problem was demanded. Hearings had been held by various Congressional committees which had developed instances of outrageous profits and scandalous charges to production costs.[33]

To this accumulating evidence of profits already taken at the expense of the taxpayers was added the realization that the accelerated tempo of procurement after Pearl Harbor would inevitably aggravate cost abuses and multiply profit rates unless swift and effective steps were taken to establish controls. War profiteering on a scale unprecedented seemed imminent. It appeared that the public debt, growing by leaps and bounds to astronomical figures, was to be further enlarged to create a crop of war millionaires. Wide profit margins permitted scandalous waste of dollars which necessarily meant waste in irreplaceable man-hours and materials. Consumer purchasing power, already battering at inflation controls, threatened to be enormously magnified by profits from war.

But however serious this might be, however pressing the demand for stringent regulation, there was one demand more serious and more pressing—the demand of the fighting fronts for an ever increasing flow of war materials. War profiteering

[32] See particularly Patterson affidavit, par. 16 (R. 66).

[33] Hensel affidavit, pars. 69–76 (R. 171–176) and 84 (R. 185).

could and should be stopped at any price—except a price paid in weapons and in war supplies. The delay involved in attempting to make the original pricing accurate when the situation made accurate pricing impossible might well imperil the entire war program; uncontrolled war profiteering could, however, have a similar result.

5. The practice of voluntary renegotiation [34]

The Services and responsibile business leaders had long recognized the dilemma and had taken steps to solve it. The method adopted, voluntary adjustment of prices after production experience and voluntary refunds of excessive profits, was based on a traditional conception of fair dealing—that a supplier selling exclusively to a single buyer intends, and the buyer intends, that the price should be fixed to produce a fair margin of profit and that it should be adjusted to that end as circumstances change.

When in June 1943 the House Naval Affairs Committee investigated renegotiation, a number of the Nation's most prominent business men testified concerning the reasons for and the conceptions underlying voluntary price adjustments and voluntary profit refunds.[35] J. F. Metten, Chairman of the Board, New York Shipbuilding Corporation, pointed out that his organization was engaged in the construction of combat ships; that the company had been forced to bid "on top of the contingencies in order to be safe"; and that voluntary price adjustments had been made to avoid "embarrassing" excessive profits. Earl O. Shreve, Vice President, General Electric Corporation, testified that in 1940 General Electric established a policy of avoiding inordinate war profits by voluntary price reductions, reductions which during 1942 amounted to $69,000,000. C. B. Lanman of the Ohio Nut and Washer Company explained that renegotiation would bring about immediate settlement of excessive profits problems, thereby avoiding years of postwar litigation, and as a result of Government review of war earnings, place industry beyond public criticism.

[34] Patterson affidavit, pars. 24–30 (R. 77–81); Hensel affidavit, pars. 89 and 90 (R. 188–189).

[35] "Legislative History of the Renegotiation Act," section IV, pp. 50–67.

Harry J. Defoe of the Defoe Shipbuilding Company, explained that early in 1942 "it became apparent that our profits were higher than we wanted to keep." The company reduced prices on outstanding contracts in an amount greater than $5,000,000. Roger Williams, the Executive Vice President of Newport News Shipbuilding and Dry Dock Company, pointed out with respect to the construction of combat vessels that "if we should attempt to estimate carefully the cost of one of those units in advance we would probably spend as much time estimating it as we did in building it." The war-time job in his opinion required immediate production of the vessels and subsequent adjustment of prices. Mr. Williams also explained that the Renegotiation Act removed the possibility of stockholder suits questioning the right of corporations to make refunds to the Government.

Donaldson Brown, the Vice Chairman of General Motors Corporation, explained that early in 1942 General Motors realized that actual production costs would be substantially less than estimated costs; thereupon price reductions were initiated which by the end of the first quarter of 1943 had saved the taxpayers $550,000,000. Roscoe Seybold explained that a similar policy had been adopted by Westinghouse Electric and Manufacturing Company, and a statement of like effect was filed by F. B. Rentschler on behalf of United Aircraft Corporation. To these voluntary refunds and price reductions must be added those by Jack & Heintz, Inc., of $10,000,000, by Continental Motors Corporation of $40,000,000, and by Sperry Corporation of $100,000,000.[36]

This was enough to point the way but it was not itself a solution to the problem. The amounts being recovered, although substantial, were only a fraction of the excessive profits realized. Furthermore, the refund practice as long as it remained on a voluntary basis inevitably penalized cooperative contractors. There was also grave doubt that even the most cooperative supplier could indefinitely continue making refunds while his less patriotic competitor accumulated inordinate reserves of excessive profits to strengthen his position in the postwar highly competitive world.

---

[36] Patterson affidavit, par. 25 (R. 77).

Thus the situation stood when the Supreme Court decided *United States* v. *Bethlehem Steel Corporation*, 315 U. S. 289, in February 1942. The Court held that the United States could not in the absence of Congressional action maintain a suit to recover excessive profits. Mr. Justice Black concluded his opinion by saying:

> But if the Executive is in need of additional laws by which to protect the nation against war profiteering, the Constitution has given to Congress, not to this Court, the power to make them (p. 309).

To the invention thus extended, Congress responded quickly. The Bethlehem decision is dated February 16. On March 28, Representative Case of South Dakota, explaining that he acted in response to the Supreme Court decision, introduced from the floor of the House an amendment to the Sixth Supplemental Appropriation Act, 1942. Congress was thereupon embarked upon one of the major legislative efforts toward one of the major legislative achievements of the war program.

6. Prior attempts at war profit control

Congress was not without experience in controlling or attempting to control war profits. The problem had recurred with increasing vigor in every war in which the United States was engaged. The Revolutionary War, the Civil War, the Spanish American War and the World War had all witnessed war profiteering and in each instance an effort had been made to provide controls. The record, however, was of outright, failure or of only partial success.

In general four types of control had been attempted. First, there was the cost-plus-a-percentage-of-cost or the cost-plus-a-fixed-fee contract. The former was an open invitation to extravagance in cost to increase profits and the latter, although limiting profits by naming a fixed profit figure, provided no incentive whatever to control costs, costs which in the end make up the bulk of the total expense to the public. Experience with these contracts had produced general agreement that they should be avoided if any alternative whatever was available. Second, there was excess profits taxation. This device, al-

though obviously an appropriate part of the war economy, had limitations which experience showed make it inadequate to meet the problem. A tax of less than 100% obviously left a margin in which war profits could accumulate. If that margin was 20% or even 10% and the base ran into millions of dollars, as it would with most of the significant producers of war material, there was still an opportunity for great accumulations of war profit with all that such profits implied in the way of impairment to morale, inflation and inefficient procurement. If the rate was adjusted upward to a full 100% the net result was a return to the cost-plus-a-fixed-fee contract, for the supplier knew that no matter how efficient or successful his operation his return would be limited to his return during the base year. The failure of the excess profits tax of the World War to control war profiteering had demonstrated the inadequacy of this method. Third, price ceilings were established. Although this was obviously a valuable measure, its purpose was not primarily the control of profits and it was not well adapted to that end. Since the full use of the entire productive capacity of the nation was absolutely essential, price ceilings necessarily had to be set at levels that would permit relatively high cost producers to continue to operate. This left wide margins within which low cost producers could accumulate excessive earnings. Price ceilings, furthermore, did nothing to control the enormous profits that tended to pile up merely as a result of the unprecedented increase in volume of production created by war demands. It appeared, too, that a price ceiling would hinder rather than assist the procurement of strictly military items and in September of 1942 these items, at the request of the Services, were exempted from the General Maximum Price Regulation.[37]

Fourth, there had been attempts in the past to limit the amount of profit to a fixed percentage of the contract price or the contract cost. This was the proposal of the Case amendment and the profit limitation was fixed at 6%.

[37] Hensel affidavit, pars. 95–98 (R. 192–196).

7. The Case amendment and the impossibilty of a rigid definition of excessive profits

The Services were quick to object to the Case amendment.[38] It was pointed out to begin with that the law would place on the War and Navy Departments an administrative burden which could not possibly be discharged. All the accountants in the country were far too few to audit every war contract and determine the allowable profit. Furthermore, the proposed limitation of 6% was grossly unfair. The appearance of uniformity hid the reality of rank discrimination. One contractor was financed by the Government; another financed his operation entirely from private capital. One contractor operated a plant constructed and owned by the United States; another operated his own plant and paid from his own pocket the entire cost of conversion. One contractor made simple products such as shoes or cloth; another made Norden bombsights or elaborate radar equipment. One contractor continued to produce by standard, time-proven manufacturing techniques; another contractor revised these techniques to make great savings in dollars, man-hours and critical materials. One contractor invented, after many weeks of work and with the exercise of a high degree of skill, a new model for a weapon or some other critical piece of equipment; another contractor invented or improved nothing but continued to produce great quantities of standard commercial articles. One contractor built his product from the basic raw material; another merely assembled what was already prepared by subcontractors. One contractor met or anticipated delivery schedules with a quality product; another was always in arrears furnishing at last goods of dubious usefulness. Under such circumstances, a 6% or any other rigid limitation necessarily sacrificed true fairness to a false and insignificant appearance of fairness.

Last of all, and this was conclusive, the Services pointed out that such a formula would impede and delay war procurement. The unfairness was itself one reason as was the waste of time

[38] "Legislative History of the Renegotiation Act," section IB, pp. 3–10.

that would be required in long and expensive audits. Furthermore, such a profit limitation was for some highly important operations much too low. No one could spend six months providing a new gauge or a new pump to be sold for $1,000 if the net return was to be limited to $60. In addition, all small business was likely to be forced outside the war effort. The return on $50,000 deliveries over a year's period would be much less than ordinary wages. To all this was added the general objection that such a fixed limitation was in result a return to cost-plus-a-percentage-of-cost contracts with all the waste of dollars, manpower, and materials that such contracts imply.

Since the Case amendment was adopted by the House on the very day it was proposed, these objections were of necessity presented first to the Senate and principally to a subcommittee of the Committee on Appropriations. The subcommittee accepted the conclusion that the amendment as offered would interfere with procurement, but insisted that some form of legislation be enacted. The Services then proposed that a Joint Resolution be adopted by Congress which would put the practice of voluntary renegotiation on a mandatory basis. The amendment, however, which was worked out by the Committee and offered by Senator McKellar on the floor of the Senate differed in material respects from the Services' recommendation. The McKellar Amendment, as the Services had requested, recognized and made mandatory the renegotiation of contracts and the refund of excessive profits, but in the last section of the bill there was set up a sliding scale of maximum allowable profits rates varying from 10% to 2% as the size of the contract increased.[39]

But every objection that applied to the first attempt at rigid definition, the 6% limit of the Case amendment, applied with equal force to the second attempt, the definition by a sliding scale. After debate the Senate concluded, as it could not avoid concluding, that the sliding scale would defeat rather than serve the purposes of the legislation and accordingly it was withdrawn. Absent this section, the bill went to conference with the

[39] "Legislative History of the Renegotiation Act," section IC, pp. 11 and 12.

House, and the conference report recommended the legislation that was ultimately adopted.

The statute as thus enacted did not contain any detailed definotion of excessive profits nor any formula pursuant to which the computation of excessive profits was to be made. The determination was to be by an exercise of judgment by the administrative officers. However, the factors that had to be considered in reaching such a judgment were well known to the representatives of the Services. For example, in March of 1942, prior to the Act, a memorandum was prepared in the War Department which was designed to guide War Department officials in conducting voluntary renegotiations. This memorandum (described in paragraph 27 of the affidavit of Robert P. Patterson and attached as Exhibit E to that affidavit) sets forth in detail the factors which are appropriate for consideration in distinuishing between reasonable and excessive profits. These same factors were referred to and explained in even more elaborate fashion in a War Department release of August 10, 1942, entitled "Principles, Policy and Procedure To Be Followed in Renegotiation," a copy of which is furnished to the Court with this brief. They were described again in the so-called Joint Statement of March 31, 1943, by the War, Navy, and Treasury Departments and the Maritime Commission of "Purposes, Principles, Policies, and Interpretations under the Renegotiation Act." When the Renegotiation Act was reenacted by the Revenue Act of 1943 this same list of factors which had from the very beginning been used as a guide in determining excessive profits was expressly adopted by the Congress and became Section 403 (a) (4) (A & B) of the amended statute.

8. The scope of the statute

Congress, having determined on renegotiation and the recapture of excessive profits as the method for controlling war profiteering, had, as part of the problem before it in April of 1942, the duty of defining the scope of operation of the statute. Since the Act was a war measure and an integral feature of the procurement program, its operation was and is confined to war business. The ordinary commercial contracts of a pro-

ducer and the profits on those contracts are in no way affected by the Renegotiation Act. The entire operation of the statute is related to contracts with the war agencies and the appropriate subcontracts and supply contracts. Every renegotiation begins therefore with a segregation of the war business from the commercial business of the contractor and the latter is left entirely undisturbed.

(a) *Application of the statute to subcontracts.*—Within the area of war business, however, no differentiation was made on the basis of the level of contracting. Subcontracts at every so-called tier, no matter how many steps removed from the prime contract, were and are made subject to renegotiation. On this point there was no debate. It was obvious that war profiteering was equally offensive to public policy, equally dangerous to morale, equally serious as a threat of inflation, equally wasteful of dollars, man-hours and materials, and equally burdensome to the taxpayer no matter at what level the profits arose. Furthermore, all the uncertainties of specifications, of design, of labor supply, of labor cost, of material supply, of material cost, etc., which made adequate pricing on prime contracts impossible were equally significant in subcontract pricing and had the same effect of making that pricing largely a matter of speculation. Indeed, the possibility of profit and price abuse at the subcontract and supply contract level was, if anything, greater than on prime contracts. Normally no representative of the public participated in the negotiation of subcontracts and supply contracts and there was inevitably an abiding temptation to prime contractors, particularly under the pressure of demands for immediate production, to obtain quotations from subcontractors and ultimate suppliers and pass these figures along to the Government as cost items or as the foundation of cost quotations without too much consideration of the propriety of the price. Furthermore, common fairness demanded that all producers of war material be treated alike, regardless of whether the particular contract was with the Government or with a Government contractor or his subcontractor or supplier. The result of these and similar considerations was that Congress, properly enough,

included as subject to renegotiation the entire hierarchy of war contractors and producers of war material.

(b) *Application of the statute to existing contracts.*—The remaining problem was to identify the contracts which, from the point of view of date of execution, would be subject to the Act. It would have been reasonable to require a refund of all excessive profits arising from business connected with the war, regardless of the date of the contracts. Such a provision would have had the merit of equal treatment for all suppliers. There was in the nature of things no particular reason why profits realized at any period after the nation began to arm should have been exempt; and certainly there would have been abundant justification for reaching all contracts executed and all profits realized after December 7, 1941. But Congress, as it was entitled to do, adopted a more conservative policy. Since the bill which included provisions for renegotiation was an appropriation bill directed primarily to the expenditure of public funds, it was provided that the statute should reach all war contracts and subcontracts, made before or after the date of its enactment, provided that final payment on the contracts had not been made on the date the statute became law; that is, on April 28, 1942. This was the most restricted provision that would serve the needs of the war program. As of April 28, 1942, there were outstanding uncompleted war contracts of a value considerably in excess of $50,000,000,000.[40] Many of these contracts had substantial periods yet to run. The ship construction contracts of the Navy were particularly important.

In the summer of 1940 Congress authorized naval expansion programs of 11% and then 70%; the contracts were executed in the main by March of 1941.[41] Most of these contracts were not completed until the latter part of 1942 and the early part of 1943. The construction of a battleship normally requires 32 to 35 months, of a carrier 17 to 21 months, and of a cruiser 22 to 25 months. It was apparent, then, in April 1942 that the war profits realized from the naval expansion program would

[40] Patterson affidavit, par. 38 (R. 88).

[41] Hensel affidavit, par. 41 (R. 157).

be exempt from recapture unless the statute was made applicable to existing agreements. Furthermore, since during the early war period the difficulties of pricing were gravest and the necessity for speed was most imperative, it was with respect to these contracts that renegotiation was most necessary. Indeed, if the renegotiation program was to meet its war objective of controlling profiteering, maintaining morale and stimulating production, it was impossible to exempt these uncompleted contracts, bulking in total $50,000,000,000. A war program for the control of war profiteering which did not reach this aggregate of agreements was scarcely more effective than no program at all.

9. The amendments to the statute

The Renegotiation Act first became law April 28, 1942, as Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Pub. 528, 77th Cong.). The statute was first amended by Section 801 of the Revenue Act of 1942 (Pub. 753, 77th Cong., approved October 21, 1942). The statute, by that Act, was reenacted with clarifying amendments and the Treasury Department was added to the list of Departments whose contracts were subject to renegotiation. The statute was again amended by the Military Appropriation Act, 1944 (Pub. 108, 78th Cong., approved July 1, 1943). By this Act it was *expressly* provided that the contracts of the four Reconstruction Finance Corporation subsidiaries, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, were subject to renegotiation. Another amendment came by the Act of July 14, 1943 (Pub. 149, 78th Cong.), which *expressly* made the agreements of contract brokers subject to renegotiation. The purpose of the statute was "to prevent the payment of excessive fees or compensation in connection with the negotiation of war contracts." Then, by Title VII of the Revenue Act of 1943 (Pub. 235, 78th Cong., enacted February 25, 1944) the entire statute was amended and reenacted. On November 16, 1944, by Proclamation 2631 (9 F. R. 13739) the President, acting pursuant to authority conferred on him by the statute

extended the period of operation of the Renegotiation Act to June 30, 1945. And finally by Public Law 104, 79th Cong. 1st Sess. approved June 30, 1945, the period of operation of the Act was again extended, this time through December 31, 1945.

B

The constitutionality of the Renegotiation Act

1. Renegotiation as an exercise of the war power

The Renegotiation Act is an exercise of the power of the Congress to wage war. It is an exercise of that power which permits the government to control the price of every commodity bought and sold within the national boundaries (*Yakus* v. *United States,* 321 U. S. 414 (1944); to fix the amount of rent to be charged for every room, home, or building and this even though to an individual landlord there may be less than a fair return (*Bowles* v. *Willingham,* 321 U. S. 503 (1944));[42] to construct extensive systems of public works (*Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288 (1936)); to operate railroads (*Northern Pacific Railway Company* v. *North Dakota,* 250 U. S. 135 (1919)); to prohibit the sale of liquor (*Hamilton* v. *Kentucky Distilleries Company,* 251 U. S. 146 (1919)); to restrict freedom of speech in a manner that would be unwarranted in time of peace (*Schenck* v. *United States,* 249 U. S. 47 (1919)); to ration and allocate the distribution of every commodity important to the war effort (*Steuart & Bro.* v. *Bowles,* 322 U. S. 398 (1944)); to restrict the personal freedom of American citizens by curfew orders and the designation of areas of exclusion (*Hirabayashi* v. *United States,* 320 U. S. 81 (1943)); and, finally, to demand of every citizen that he serve in the armed forces of the nation (*Falbo* v. *United States,* 320 U. S. 549 (1944); *Selective Draft Law Cases,* 245 U. S. 366 (1918)).

---

[42] Mr. Justice Douglas said:

"A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a 'fair return' on his property" (p. 519).

> The war power of the national government is "the power to wage war successfully." See Charles Evans Hughes, War Powers Under the Constitution, 42 A. B. A. Rep. 232, 238. It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution, and progress of war.[43]

It cannot be seriously contended that the war power, reaching as it does every activity relating to war and permitting national control over the lives and liberties of men, does not include the power to regulate war profiteering.

Furthermore, the Supreme Court has itself declared that Congress has power to control war profits. The final sentence of the opinion in *United States* v. *Bethlehem Steel Corporation,* 315 U. S. 289 (1942) reads:

> But if the Executive is in need of additional laws by which to protect the nation against war profiteering, the

---

[43] Mr. Chief Justice Stone in *Hirabayashi* v. *United States*, 320 U. S. 81, 93 (1943).

Compare Mr. Justice Sutherland in *United States* v. *Macintosh*, 283 U. S. 605, 622 (1931):

"From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams—'This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protecti[on] of liberty, property and of life.' To the end that war may not result in d[efeat] freedom of speech may, by act of Congress, be curtailed or denied so [as to] the morale of the people and the spirit of the army may not be brok[en by] seditious utterances; freedom of the press curtailed to preserve our mil[itary] plans and movements from the knowledge of the enemy; deserters [and] spies put to death without indictment or trial by jury; ships and sup[plies] requisitioned; property of alien enemies, theretofore under the prote[ction] of the Constitution, seized without process and converted to the [public] use without compensation and without due process of law in the ord[inary] sense of that term; prices of food and other necessities of life fix[ed and] regulated; railways taken over and operated by the government; and [other] drastic powers, wholly inadmissible in time of peace, exercised to mee[t the] emergencies of war."

> Constitution has given to Congress, not to this Court, the power to make them (p. 309).

Here is full recognition, in the most explicit terms possible, of Congressional authority to regulate war profiteering.

2. Renegotiation as regulation

It is suggested that renegotiation is a taking of property for public use without payment of just compensation. This however, confuses the regulatory power of the Federal government with the power of eminent domain. Renegotiation is not in any aspect an exercise of eminent domain power. By the Renegotiation Act, Congress was neither authorizing requisitions nor in any way exercising eminent domain powers; Congress was, on the contrary, exercising its war powers for the purpose of elminating war profiteering in order to maintain morale, control inflation, and promote efficiency in war production as well as to reduce the cost of the war to the nation. Renegotiation is wartime regulation just as wartime price control is regulation.

It seems obvious, too, that property delivered to the United States under a contract, and certainly property delivered to Douglas under a contract, is not "taken" by the United States in the constitutional sense. Appellants cite no case that holds or even intimates that property delivered under a contract is "taken" by the United States under the power of eminent domain. Such a conclusion would not only be a radical departure from common understanding but it would be departure with staggering implications. If receipt under a contract is a "taking," the United States must litigate the measure of just compensation for every single item of equipment and material which, to cite only one illustration, has been used by the armed forces in the war. And appellants' suggestion is even more ambitious. Appellants suggest not only that every delivery to the United States is a constitutional taking, but that every delivery to every contractor doing work on materials eventually to be used by the United States is a "taking" by the United States. The result of acceptance of this novel doctrine would be truly beyond imagination.

The fact of the matter is, of course, that the difference between a requisition by the United States and purchase by the United States is understood by everyone. And this common understanding is reflected in the acts of Congress. War purchasing was done primarily pursuant to Section 201 (50 U. S. C. A. Supp. III 611) of the First War Powers Act, 1941 (55 Stat. 839) as amended and Executive Order 9001 (6 F. R. 6787) as amended. Authority to requisition materials required for the defense of the United States was conferred upon the President by an entirely separate act, the Act of October 16, 1941 (55 Stat. 742, 50 U. S. C. A. Supp. III 721) and elaborate provision is made for the payment of just compensation, with the Court of Claims making the ultimate decision as to the amount to be paid. This statute, and indeed the entire history of Congressional legislation, demonstrates that Congress fully understands the power of eminent domain and the methods by which it may properly be exercised. It is equally plain that in the Renegotiation Act Congress was not in any way exercising eminent domain powers. The rules, therefore, and the cases which have to do with the permissible methods for determining compensation upon an exercise of eminent domain powers have nothing whatever to do with renegotiation. The limitations on renegotiation are the limitations appropriate to an exercise of the war power. The limitations on the exercise of eminent domain power are entirely irrelevant. Throughout most of their brief appellants recognize this fact. If renegotiation was eminent domain at work, all the talk by appellants about delegation of legislative power, about findings of fact, about notice and hearing, about secret data, about abrogation of private contracts would be meaningless. Appellants' argument and appellants' cases are addressed to the validity of regulation, not to the validity of condemnation.

Furthermore the method of regulation adopted by the Renegotiation Act, the requirement of a refund of excessive earnings, has been approved by the Supreme Court in *Dayton-Goose Creek Railway* v. *United States,* 263 U. S. 456 (1924) and in that case the contention of a taking of property without compensation was expressly rejected.

The Transportation Act of 1920 (41 Stat. 456) was enacted when, following the last war, the railroads were about to be returned to private ownership. The statute was designed to assist in the establishment of a system of railroad transportation adequate to the needs of the nation. The roads, many of them, were weak both in financial structure and as operating organizations. Congress conferred on the Interstate Commerce Commission broad remedial powers. The Commission was authorized, among other things, to make such rate adjustments as might be advisable, and pursuant to that authorization substantial rate increases were ordered. Ex Parte 74, 58 I. C. C. 220. These rates were set, and Congress recognized that under the circumstances they had to be set, not carrier by carrier, but on a nation-wide or regional basis. Congress realized however, that a uniform rate for all carriers in a rate group would inevitably result in high earnings for the efficient and low earnings for the inefficient roads. A rate high enough to maintain the inefficient carrier, whose roads were necessary to an adequate transportation system, would necessarily yield to efficient lines a return in excess of a fair return. The answer to this dilemma was Section 15a (49 U. S. C. 15a) which provided, in substance, that the earnings of a carrier in excess of 6% of the value of its aggregate property were to be divided—one half retained by the carrier for limited purposes and the other half to be transferred to and used by the Commission as a revolving fund to make loans to other carriers.[44]

Acting pursuant to the statute the Commission determined the aggregate value of the Dayton-Goose Creek road, determined the amount of profit realized by the road in excess of 6% of the value, and directed that one-half of this amount be paid to the Commission. The order and the statute were attacked as contrary to the Constitution. It was argued that the recapture provision was not a regulation of interstate com-

[44] Section 15a was repealed by the Emergency Railroad Transportation Act of 1933 (48 Stat. 220). In 1933 the railroads because of the depression had no funds to discharge obligations to the I. C. C. which had earlier accrued and such monies as were available were urgently needed to pay operating expenses. Furthermore it was extremely unlikely under prevailing business conditions that any excessive profits would be earned in the foreseeable future. See House Report No. 193, 73rd Congress, 1st Session.

merce but a taking of private property without compensation; that if any refund could constitutionally be required the refund must be to the shippers who had paid the rate charges and not to the United States; that the rates under which the profits were earned were not in fact excessive; that the effect of the statute was to work an arbitrary discrimination between efficient and inefficient carriers; that the statute made no proper provision for the consideration of deferred liabilities; that recapture of profits arising from both intrastate and interstate business violated the Tenth Amendment; that the actual value of the road was in excess of the value fixed by the Commission, etc.

To all these objections the Supreme Court replied with a sweeping opinion holding in substance that the objective of maintaining an adequate transportation system was, under the Constitution, a legitimate objective of the Federal Government and that the recapture of excessive profits was well adapted to achieve that objective and was therefore lawful. The discussion in this and other opinions relating to the recapture clause [45] is phrased in terms appropriate to the regulation of rates under the commerce clause. But the conclusion, that recapture of excessive profits, if related to a legitimate objective of the Federal Government, is within the power of that Government, sustains under the Constitution not only Section 15a of the Transportation Act but also the Act of Congress now before the court. For however wide the argument in this case may become and whatever may be the turn that it takes, there can never be a dispute that renegotiation was a necessary, an integral and an essential part of the war program. This is as far beyond reasonable doubt as it is beyond reasonable doubt that success in the war was a legitimate and constitutional objective of the Federal Government.

---

[45] See *Wisconsin R. R. Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563 (1922); *The New England Divisions Case*, 261 U. S. 184 (1923); *St. Louis and O'Fallon R. Co.* v. *United States*, 279 U. S. 461 (1929); *Richmond, F. & P. R. Co.* v. *McCarl*, 62 F. (2d) 203 (D. C. App., 1932). Compare the cases sustaining pooling arrangements under which money demands are made upon one member of a group to protect the interests of the entire group. *Noble State Bank* v. *Haskell*, 218 U. S. 104 (1911); *United States* v. *Rock Royal Co-op.*, 307 U. S. 533 (1939).

3. The contention of unlawful delegation of legislative power

Appellants contend that the statute unlawfully delegates legislative power to the renegotiating officials. This contention, so often made and so seldom accepted, has as little validity here as in the hundreds of other cases where it has been urged unsuccessfully. There are many reasons:

(a) Congress fully discharged its constitutional duty to legislate and conferred no legislative power on the renegotiating officials;

(b) The courts have always recognized that war legislation, such as the Renegotiation Act, requires the delegation of broad powers to executive officers;

(c) The standards established by the Act are more than sufficient to meet constitutional requirements; and

(d) In any event, Congress ratified and adopted the very elaborate and detailed administrative standards.

(a) Congress discharged its constitutional duty to legislate and conferred no legislative power on the renegotiating officials

The obligation of Congress to legislate is at most an obligation to do three things: to consider the problem before the nation; to reach a policy decision; and to select the method for making the policy conclusion effective. No one familiar with the legislative history of the Renegotiation Act can contend that Congress either failed to consider the problem of war profiteering, or failed to make the policy determination that excessive war profits must be eliminated, or failed to give careful consideration to the available methods for bringing about that result. The choice was between some rigid formula (such as the 6% limitation of Representative Case or the sliding scale arrangement of Senator McKellar) and an exercise of administrative judgment. Congress, after careful consideration and in order to be fair to all war contractors and to avoid crippling the war procurement program (See Section A–7 of this brief), chose the second alternative. There was, therefore, on the record, a full discharge by the Congress of its legislative functions.

Furthermore, the duties assigned to the administrative officials under the Act are in no way legislative duties. The essence

of legislation is the enactment of general rules having general application. The Act does not contemplate that the renegotiating officials shall formulate such general rules. What the Act contemplates is, on the contrary, a case by case consideration of the circumstances of each individual contractor and a judgment in each case as to whether the profits realized are excessive. There is no authority whatever to sustain an argument that delegation to administrative officials of power to make a case by case determination is a delegation of legislative power and no court has ever held unconstitutional a statute which required this case by case consideration.

Since Congress, on the record, discharged its constitutional duty to legislate and since no legislative power was conferred on the renegotiating officials, there has been no violation of the Constitution and a consideration of the presence or absence of "standards" in the statute is, strictly speaking, irrelevant. However, the statute does contain such "standards." The phrase "excessive profits" is itself a sufficient guide to judgment. It is not an empty phrase of exhortation. For the business community and for renegotiating officials it is weighted with content for it is read in the light of the common understanding that customary business practice contemplates a fair and reasonable profit. The determination of fair profit in any particular case calls inevitably for a judgment, but for a judgment within a generally understood range and exercised in the light of generally accepted practices. The range of fair profit is, within limits, well outlined by ordinary business practice, by tax rates, by rates of return allowed by public utility commissions, by statutory rates of return such as the Vinson-Trammel Act, by interest rates during peacetime as a manifestation of fair return on money invested, by usury laws and other statutes fixing legal rates of interest, by banking standards and the everyday business technique of capitalizing return as a method of determining value, by average corporate dividends, by rates of return on preferred stocks, by insurance company guarantees on annuity contracts, by profit allowances on cost-plus-a-fixed fee contracts, etc. For more particular guidance there is the generally prevailing rate of return in the industry in question and, of course, the prior financial history of the particular con-

tractor. Add to this the more critical and crucial items, the problems and achievements of the contractor in war work, and a foundation is laid upon which a determination of excessive profits can be made quickly, sensibly and with sufficient accuracy to command general acceptance.

To the standard thus provided by the phrase "excessive profits" the statute adds the further guide of the Internal Revenue Code. Section 403 (c) (3) of the Act reads in part:

> In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code.

Chapter 1 of the Internal Revenue Code, consisting of some 400 sections, is the chapter which levies the Federal income tax. Chapter 2E, consisting of some 80 sections, levies the Federal excess profits tax. There is thus made available to guide the renegotiating officials the most elaborate and detailed instructions concerning profits known to the law. Under these circumstances it can hardly be said that the administrative officers are left without Congressional direction, and proof, if proof be needed, that the standards of the Act are sufficiently accurate for the purposes intended, is furnished in overwhelming proportions by the single fact that in 97.5% of the renegotiation proceedings agreement has been reached as to the amount of excessive profits to be refunded.[46] It is submitted that if the renegotiating officials and the contractors can in more than 97% of the cases reach agreement as to what the statute intends, no legitimate or even significant complaint can be made about the absence of standards.

(b) War legislation requires delegation of broad powers to administrative officials

No court has ever held unconstitutional on the the grounds of delegation of legislative power a statute enacted pursuant

[46] Patterson affidavit, par. 41 (R. 89).

to the federal war power.[47] On the contrary, the Supreme Court has repeatedly recognized that a war is primarily a legislative and an executive job with the division of authority to be as Congress sees fit. *Highland* v. *Russell Car Co.*, 279 U. S. 253, 261 (1929); *Stewart* v. *Kahn*, 78 U. S. 493, 506 (1870). In *Hirabayashi* v. *United States*, 320 U. S. 81 (1943), it was forcefully pointed out that Congress in the exercise of the war power has wide authority to determine "the nature and extent of the threatened injury and in the selection of the means for resisting it." And the court said:

> Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, *it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs* (p. 93).

A striking illustration of the extent to which Congress may, during a period of war, delegate power to executive officials is furnished by the Second War Powers Act, the Act of June 28, 1940 (54 Stat. 676) as amended (50 U. S. C. A. Supp. III 633). The entire national program for rationing and allocation of materials was founded upon a single sentence of the statute.

> Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary for appropriate in the public interest and to promote the national defense.

---

[47] See *United States* v. *Wright*, 48 F. Supp. 687 (1943):

"* * * With the question of delegation so fixed, I find that no court has ever attempted to strike down what Congress has determined to be appropriate to carry into effect its broad war powers under the Constitution. In fact, the question of the delegation has seldom, if ever, appeared in connection with a construction of the war power. * * *"

This almost unlimited delegation of power to the President has been uniformly sustained as within constitutional government.[48] If under the exigencies of war Congress can delegate to the President power to ration and allocate "any material or facility" as to which there is a shortage in any manner that he deems appropriate "in the public interest and to promote the national defense," it is difficult to believe that Congress cannot leave to administrative officials the much simpler and more limited task of exercising a case by case judgment of excessive profits.[49]

(c) The standards of the Renegotiation Act are sufficient to meet the requirements of peacetime legislation

Even if the Renegotiation Act were adopted in times of peace for peacetime purposes, the standards established by the Act would be more than sufficient to meet the requirements of the Constitution. The general principles which have guided th Supreme Court in deciding questions of delegation of legislative power place the propriety of this statute far beyond dispute. These principles were recently announced by Chief Justice Stone in *Yakus* v. *United States*, 321 U. S. 414 (1944):

> The Constitution as a continuously operative charter of government does not demanded the impossible or the

[48] *O'Neal* v. *United States*, 140 F.(2d) 908 (C. C. A. 6, 1944), certiorari denied, 322 U. S. 729; *United States* v. *Randall*, 140 F. (2d) 70 (C. C. A. 2, 1944); *Gallagher's Steak House* v. *Bowles*, 142 F. (2d) 530 (C. C. A. 2, 1944), certiorari denied, 322 U. S. 764; *Country Garden Market, Inc.* v. *Bowles*, 141 F. (2d) 540 (D. C. App., 1944), certiorari denied, 322 U. S. 752; *Walter Brown & Sons* v. *Bowles*, 58 F. Supp. 323 (1944); *United States* v. *Tire Center, Inc.*, 50 F. Supp. 404 (1943).

[49] See also *United States* v. *Chemical Foundation*, 272 U. S. 1 (1926) sustaining a statute providing that the Alien Property Custodian "shall have power to manage such property and do any act or things in respect thereof * * * in like manner as though he were the absolute owner thereof," and *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163 (1919) accepting a Joint Resolution of Congress providing that the President "is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or take possession * * * of any telegraph, telephone, marine cable, or radio system * * *."

For cases sustaining delegation of broad powers to executive officials in the comparable field of foreign affairs, see *Hampton & Co.* v. *United States*, 276 U. S. 394 (1928); *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304 (1936); *United States* v. *Bush*, 310 U. S. 371 (1940).

> impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.
>
> * * * * * * *
>
> As we have said, "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality * * * to perform its function." *Currin* v. *Wallace, supra,* 15. Hence it is irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed; for example, that all prices should be frozen at the levels obtaining during a certain period or on a certain date. See *Union Bridge Co.* v. *United States,* 204 U. S. 364, 386. Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. Compare *M'Culloch* v. *Maryland,* 4 Wheat., 316, 413 *et seq.* It is free to avoid the rigidity of such a system which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards. Cf. *Hampton & Co.* v. *United States, supra,* 408, 409 (pp. 424, 425, 426).

Certainly, if, as the Chief Justice says, the Constitution does not demand the impracticable, nor require that Congress become a fact-finding body, nor deny Congress the resources of flexibility, nor confine Congress to that method of executing its policy which involves the least delegation to administrative officials, certainly if these things are true, the statute before the Court is beyond question.

This conclusion is sustained by a host of decisions which have approved standards far less definite and far less specific than the standards of the Renegotiation Act.

(i) *The standard of "necessary."*—Against a contention of unlawful delegation of legislative power, the Supreme Court

has frequently approved statutes in which the only standard of action furnished to the administrative officials was the instructions to take such action as might be necessary to effectuate the legislative policy.

1. Congress authorized the Secretary of War *"to do everything by him deemed necessary to* * * * prevent the keeping * * * of houses of ill fame * * * within such distance *as he may deem needful* of any military camp * * *." Approved in *McKinley* v. *United States,* 249 U. S. 397 (1919).

2. A state board was authorized to regulate the sale of illuminating oil and "to adopt standards of safety, purity or absence from objectionable substances * * * *which they may deem necessary* to provide the people of the state with satisfactory illuminating oil." Approved in *Red "C" Oil Co.* v. *North Carolina,* 222 U. S. 380, 390 (1912).

3. The Secretary of the Interior, exercising control over national forests, was authorized "to make such rules and regulations and establish such service *as will insure the objects of such reservation* * * *." Approved in *United States* v. *Grimaud* 220 U. S. 506, 515 (1911).

4. The Secretary of Agriculture was directed to issue, after notice and hearing, an order which would "tend to effectuate the declared policy of this title * * *." Approved in *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 542 (1939).

Indeed, statutes vesting in administrative officers a general and unconfined power to issue regulations and to make specified determinations have been held to involve no delegation of legislative power.

5. Congress provided "That the Secretary of the Treasury, upon the recommendation of the said board, *shall fix and establish uniform standards* of purity, quality and fitness for consumption of all kinds of teas imported into the United States * * *." Approved in *Buttfield* v. *Stranahan,* 192 U. S. 470, 471 (1904).

6. Congress authorized the Secretary of the Interior "to make rules and regulations governing the use of roads * * *, including *the fixing and collection of tolls where deemed necessary* and advisable in the public interest." Approved by this Court in *Rogge* v. *United States,* 128 F. (2d) 800 (C. C. A.

9, 1942), certiorari denied, 317 U. S. 656, against the contention that the absence of any congressional standard as to amount of the tolls resulted in an unlawful delegation of legislative power.

These cases make it clear that, had Congress so desired, powers much broader than those granted by the Renegotiation Act could have been lawfully delegated to the administrative officials. Since the policy of the statute against war profiteering is plain, Congress could have, under the authority of these cases, delegated to the Secretary of War, for example, authority to take such action as would "tend to effectuate the declared policy" against profiteering or "to do everything by him deemed necessary" for that purpose or "to make such rules as will insure" achievement of the national objective—authority certainly far more extensive than that provided in the existing statute. And if administrative officials may be allowed to establish "uniform standards of purity, quality and fitness for consumption" and "standards of safety, purity or absence of objectionable substances," it is difficult to see why they may not on a case-to-case basis determine whether profits are "excessive." The formulation of general standards of purity or safety is certainly more legislative in character than is a determination based upon the facts of each case that a portion of the profits received by a contractor are excessive.

(ii) *The standard of "public interest."*—That administrative officers of the Government may be allowed to apply standards much more elusive than the standards of the Renegotiation Act is demonstrated by the enabling acts establishing the best known of the Federal administrative agencies.

1. The Interstate Commerce Commission, in authorizing one railroad to lease the facilities of another, is directed to apply the standard of "the public interest." See *United States* v. *Lowden*, 308 U. S. 225, 230 (1939); *New York Central Securities Co.* v. *United States*, 287 U. S. 12 (1932).

2. The Federal Communications Commission must regulate radio stations "as public interest, convenience or necessity requires." See *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943).

3. The Federal Trade Commission is directed to eliminate "unfair methods of competition." See *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304, 310 (1934).

It seems self-evident that the test of "excessive profits" is much less indefinite and much less legislative in character than the formula "as the public interest may require."

(iii) *The standard of "reasonable."*—Finally there are many decisions recognizing the propriety of delegating to administrative officials the power to make a judgment as to what is fair and reasonable under the circumstances. "Fair," "just" and "reasonable," without further definition, have been accepted as adequate standards. "Excessive" is only the obverse side of "reasonable" and is therefore equally valid.

1. Congress authorized the President to suspend duty-free importation of certain products whenever the tariffs of other countries were *"reciprocally unequal and unreasonable."* Approved in *Field* v. *Clark*, 143 U. S. 649, 680 (1892).

2. In 1889, Congress provided "That whenever the Secretary of War shall have reason to believe that any railroad or other bridge * * * is an *unreasonable obstruction"* to navigation, steps should be taken by him to require the owners "to alter the same as to render navigation through or under it reasonably free, easy and unobstructed * * *." Approved in *Union Bridge Co.* v. *United States*, 204 U. S. 364 (1907)[50]

3. The Transportation Act of 1920 authorized the Interstate Commerce Commission to make "reasonable" rules for alleviating shortages of equipment. See *Avent* v. *United States*, 266 U. S. 127 (1924).

4. Congress levied a tax of 8% on amounts paid for transporting oil and provided that if no charge had been made, the tax was to be "on the basis of a *reasonable* charge for such trans-

[50] "By the statute in question Congress declared in effect that navigation should be free from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. *In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power*" (pp. 385–386).

portation, as determined by the Commissioner." Approved by this Court in *Standard Oil Co.* v. *McLaughlin*, 67 F. (2d) 111 (C. C. A. 9, 1933), certiorari denied, 292 U. S. 631.[51]

Here is authority in abundance to support the proposition that a standard of "fair," a standard of "just" a standard of "reasonable," is, *without further definition,* an adequate standard. Administrative officials receiving grants of power to determine what is "reasonable," necessarily and inevitably are authorized to determine what is "excessive." [52] These cases, therefore, must be included among those which give to the Renegotiation Act the support of unequivocal precedent. And to all this must be added the express recognition by the Supreme Court of the propriety of establishing a standard by the use of a single word such as "just" or "reasonable" or "excessive."

---

[51] See also *La Forest* v. *Board of Commissioners*, 92 F. (2d) 547 (D. C. App., 1937), certiorari denied, 302 U. S. 760. Congress delegated to the Commissioners of the District of Columbia power "to make, modify, repeal, and enforce *usual and reasonable* traffic rules and regulations relating to vehicles * * *."

[52] It is difficult to believe that the authors of the Constitution intended to forbid the use by Congress of the word "excessive" as a guide to the determination of legal rights since the Constitution makes personal liberty itself turn upon an understanding of "excessive." The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Similar provisions appear in state constitutions. See, for example, Article I, Section 6 of the California Constitution:

"Right to bail—Rights of witnesses; All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted. Witnesses shall not be unreasonably detained, nor confined in any room where criminals are actually imprisoned."

If "excessive" is sufficiently precise in meaning to constitute an adequate statement of constitutional rights affecting personal liberty, it surely is sufficiently precise to be an adequate guide to administrative officials.

The test of "excessive" is frequently used in state legislation. For example, Section 657 of the California Code of Civil Procedure lists as a ground for a new trial: "Excessive damages, appearing to have been given under the influence of passion or prejudice."

For other illustrations, see the statutes referred to in *Greenwood County* v. *Shay*, 23 S. E. (2d) 825 (S. C. 1943) (excessive punishment); *Taylor* v. *Koenigstein*, 260 N. W. 544 (Neb. 1935) ("excessive drinking"); *Alexander* v. *Able*, 70 S. E. 1009 (S. C. 1911) ("excessive" rent distraint); *State* v. *Small*, 11 N. W. (2d) 377 (Iowa, 1943) (excessive punishment).

In *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 398 (1940), Mr. Justice Douglas said:

> The problem of fixing reasonable prices for bituminous coal cannot be differentiated legally from the task of fixing rates under the Interstate Commerce Act (41 Stat. 484, 49 U. S. C. § 15) and the Packers and Stockyards Act (42 Stat. 166, 7 U. S. C. § 211). The latter provide the *standard of "just and reasonable"* to guide the administrative body in the rate-making process. The validity of that standard (*Tagg Bros. & Moorhead* v. *United States, supra*), the appropriateness of *the criterion of the "public interest"* in various contexts (*New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 24; *United States* v. *Chemical Foundation,* 272 U. S. 1; *Avent* v. *United States,* 266 U. S. 127), the legality of the *standard of "unreasonable obstruction"* to navigation (*Union Bridge Co.* v. *United States,* 204 U. S. 364) all make it clear that there is a valid delegation of authority in this case. (P. 398.)

Indeed, to strike down at this late date a statute which provides the single word "reasonable" or "just" as the standard for the administrative action would be to repudiate the established practice of many decades in the regulation of public utilities. The conventional statute, enacted not only by Congress but in virtually every state of the Union, authorizes a public utilities commission to fix "reasonable" rates. Traditionally, there is no definition of the term "reasonable." See, for example, the provisions of the Transportation Act, 49 U. S. C. A. 15:

> Whenever, after full hearing, * * * the commission shall be of opinion that any individual or joint rate, fare or charge * * * is or will be unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, * * * the commission is authorized and empowered to determine and prescribe what will be the just and reasonable, individual or joint, rate, fare, or charge * * *.

The provisions of the Public Utilities Act of California, Section 32, are typical of many state statutes:

> Whenever the Commission * * * shall find that the rates * * * are unjust, unreasonable, discriminatory or preferential, * * * the Commission shall determine the just, reasonable or sufficient rates * * *.

For this Court to hold now that a standard of "reasonable" or "excessive" is not an adequate standard would not only repudiate what has been accepted without question for many decades, but it would cast doubt upon the validity of much federal legislation and virtually every public utility act on the statute books of the states.

(iv) *The cases cited by appellants.*—The cases cited by appellants demonstrate appellees' contentions. Those cases, by illustrating the type of statute which involves a delegation of legislative power, serve to distinguish a valid statute such as the Renegotiation Act. Appellants rely on language from the opinions in *Panama Refining Company* v. *Ryan,* 293 U. S. 388 (1935) and *Schechter Poultry Corporation* v. *United States,* 295 U. S. 495 (1935)[53] and on three cases arising under the Lever Act. In the *Panama* case, Congress had authorized the President, if, as and when he thought it desirable, to issue a general order prohibiting the shipment in interstate commerce of oil produced in excess of state quotas, so-called hot oil. Since Congress itself had neither condemned nor condoned hot oil shipments and had thus failed to establish a policy, and since the President was empowered to issue a general order, without case-by-case consideration, the Supreme Court held Congress had attempted to authorize the President to legislate. The Renegotiation Act is in no way comparable. The policy of the statute is fixed by the *direction* to eliminate excessive profits and case-by-case consideration, rather than a general order, is

[53] The *Panama* and *Schechter* cases together with *Carter* v. *Carter Coal Company,* 298 U. S. 238 (1936) have resulted in a great deal of controversy as fruitless as it seems endless. Torn from its context, the language of Mr. Chief Justice Hughes is used to create a debate about the validity of every act of Congress delegating power to an administrative agency. The debate has never failed to end in a decision sustaining the statute.

required. In the *Schechter* case Congress attempted to empower the President to give the force of law to so-called codes of fair competition. The codes could and did include any and every provision deemed desirable by its authors, the members of industry committees. This the Court held was legislation by the President and the committee members. The Renegotiation Act is very different. Certainly, a statute authorizing case-by-case determination of excessive profits cannot fairly be compared to a statute authorizing the unlimited regulation of industry.

The three cases arising under the Lever Act upon which appellants rely [54] do not touch upon the problem before the Court. They deal not with the propriety of delegation of power to Government officials but with a very different problem, the problem of the duty of Congress when, *without administrative assistance,* Congress itself seeks to define crimes or to declare transactions unlawful. In the *Cohen Grocery* case Congress did not authorize a Government official to fix reasonable prices but attempted to obligate each seller to make that decision for himself in each sale transaction on peril of criminal penalties if a jury should later come to a different conclusion. Nothing like this is in any way involved in renegotiation. The *Small Co.* case applies the *Cohen Grocery* case to a situation in which a defendant sought to avoid his contractual obligations by contending that the price he agreed to pay was an unjust charge and therefore unlawful. Here no such effort is made. The Government seeks only to prevent unjust enrichment of appellants at public expense by enforcing a conclusion reached by a duly authorized Government official, after a hearing, that on its total renegotiable business for 1942 appellants realized excessive profits.[55]

---

[54] *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921); *Weeds* v. *United States*, 255 U. S. 109 (1921); *Small Co.* v. *American Sugar Co.*, 267 U. S. 233 (1925).

[55] It is worth noting that Justices Pitney and Brandeis, dissenting in the *Small Co.* case, found nothing vague in the constitutional sense in the phrase "excessive prices" even for purposes of a criminal case. "Excessive profits" has even less inherent uncertainty. Prices range widely, fluctuating violently under some circumstances from one day to the next. Rate of profit in American business experience fluctuates much more narrowly and customary profit lies within well understood limits.

The controlling distinction, however, is that this case involves the propriety of a delegation of power to a Government official to make specific what the statute provides in general terms. In the Lever Act cases upon which appellants rely, there was no such delegation.[56] The importance of the difference is abundantly clear. The Lever Act method of price control, without the aid of administrative tribunals, was held unconstitutional. The current method of price control, with the aid of administrative officials, is constitutional. *Yakus* v. *United States,* 321 U. S. 414 (1944). This forcefully illustrates what Chief Justice Taft pointed out in *Mahler* v. *Eby*, 264 U. S. 32, 41 (1924), a case cited by appellants. In distinguishing the *Cohen Grocery* case he said:

> In those cases, statutes were held invalid for vagueness. They were both criminal cases in which the uncertain words of the statute encountered the limitation of the Fifth and Sixth Amendments. They did not inform the accused sufficiently of the nature and cause of the accusation. *The rule as to a definite standard of action is not so strict in cases of the delegation of legislative power to executive boards and officers* (p. 41).

The Supreme Court has itself declared, therefore, that appellants' cases are not to be accepted as guides in deciding the question before this Court.

(v) *Mutual Film Corporation* v. *Ohio Industrial Commission.*—If a single case were to be selected as a complete answer to appellants' arguments, this decision, reported at 236 U. S. 230 (1915), might well be chosen.

Ohio passed a law establishing a board of censors to review motion pictures. Section 4 of the statute provided:

> Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board (p. 240).

---

[56] Note, however, that when the President, acting pursuant to the Lever Act, fixed prices by an administrative determination, his action and the statute were sustained. *Highland* v. *Russell Car Co.*, 279 U. S. 253 (1929). And note too the care with which the court in the *Small Co.* case pointed out that there was no applicable administrative action.

In reply to the claim that this was unlawful delegation of legislative power, Mr. Justice McKenna said:

> The objection to the statute is that it furnishes no standard of what is educational, moral, amusing or harmless, and hence leaves decision to arbitrary judgment, whim, and caprice; or, aside from those extremes, leaving it to the different views which might be entertained of the effect of the pictures, permitting the "personal equation" to enter, resulting "in unjust discrimination against some propagandist film," while others might be approved without question. But the statute by its provisions guards against such variant judgments, *and its terms, like other general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies.* This has many analogies and direct examples in cases, and we may cite *Gundling* v. *Chicago,* 177 U. S. 183; *Red "C" Oil Manufacturing Co.* v. *North Carolina,* 222 U. S. 380; *Bridge Co.* v. *United States,* 216 U. S. 177; *Buttfield* v. *Stranahan,* 192 U. S. 470. See also *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 86. If this were not so, the many administrative agencies created by the state and National governments would be denuded of their utility and government in some of its most important exercises become impossible.
>
> * * * * *
>
> We may close this topic with a quotation of the very apt comment of the District Court upon the statute. After remarking that the language of the statute "might have been extended by descriptive and illustrative words," but doubting that it would have been the more intelligible and that probably by being more restrictive might be more easily thwarted, the court said: "In view of the range of subjects which complainants claim to have already compassed, not to speak of the natural development that will ensue, it would be next to im-

possible to devise language that would be at once comprehensive and automatic" [57] (pp. 245–247).

Just as "moral," "educational," and "harmless" are standards which "get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct," so does the phrase "excessive profits" have precision from the sense and experience of men and that phrase too, as the history of renegotiation so abundantly demonstrates, is a certain and useful guide in reasoning and conduct. And just as the Ohio statute "might have been extended by descriptive and illustrative words" this statute might have been extended, but here as there it is by no means clear that it would have been "the more intelligible."

(d) Congressional approval of administrative practice

When the Revenue Act of 1942 was before the Senate Finance Committee, the renegotiating departments presented certain amendments to the Renegotiation Act which were designed to clarify the statute.[58] During the committee hearings, a War Department representative was asked to explain the practice of the Departments in arriving at a determination of excessive profits. In direct response to this inquiry the War Department release of August 10, 1942, (filed with this brief) was submitted to the committee.[59] The full committee appointed a subcommittee to give further attention to the proposed amendments. The release of August 10 was filed with the subcommittee.[60] Pages 12 to 16 of this release state very elaborate and detailed standards for determining excessive profits. Those standards were necessarily approved by Congress when, with full understanding of the administrative practice, Title VIII

[57] Compare the decisions accepting statutes against the contention that critical terms were not adequately defined. *Shields* v. *Utah-Idaho R. Co.*, 305 U. S. 177, 180 (1938) : *Pittsburgh Glass Co.* v. *Board*, 313 U. S. 146, 165, (1941) ; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 400 (1940). Mr. Justice Douglas said :

"That guide is sufficiently precise for an intelligent determination of the ultimate question of fact by experts."

[58] "Legislative History of the Renegotiation Act", Section II, pp. 22–42.

[59] "Legislative History of the Renegotiation Act", paragraph II A 1, p. 23.

[60] "Legislative History of the Renegotiation Act", paragraph II B1, p. 32.

of the Revenue Act of 1942 was passed reenacting the significant sections of the Renegotiation Act. It was expressly provided that the statute, as thus amended, was effective as of the date of the original enactment.

Since the determination of appellants' excessive profits was made on February 2, 1944, long after the amendments of October 21, 1942, approving the administrative practice, there can now be, under settled law, no complaint based on an alleged lack of standards in the original statute or any claim of injury to appellants because of the absence of such standards. *Hirabayashi* v. *United States,* 320 U. S. 81 (1943), to name only one case, holds that under circumstances such as those before the Court, any objection based on delegation of legislative authority is foreclosed. Pursuant to an executive order issued on February 19, 1942, curfew regulations were promulgated by Army officials on March 2 and March 16, 1942. By the Act of March 21, 1942, Congress provided that failure to comply with these curfew regulations was a misdemeanor. The Supreme Court found that the regulations issued under the executive order were before Congress when it considered the Act of March 21, 1942, and that the purpose of that statute was to provide a method for enforcement of the executive order and regulations issued pursuant to it. It was argued that the regulations were void as an attempt by the executive to exercise legislative powers. This objection, the Court held, was foreclosed by the Act of March 21, 1942, since Congress by that Act ratified and confirmed the prior executive orders.

Mr. Chief Justice Stone said:

> The conclusion is inescapable that Congress, by the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066. *Prize Cases,* 2 Black 635, 671; *Hamilton* v. *Dillin,* 21 Wall. 73, 96–97; *United States* v. *Heinszen & Co.,* 206 U. S. 370, 382–384; *Tiaco* v. *Forbes,* 228 U. S. 549, 556; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 146–148; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 300–303; *Mason Co.* v. *Tax Comm'n,* 302 U. S. 186, 208. And so far as it lawfully could, Congress authorized and implemented such curfew orders as the commanding officer should promulgate

> pursuant to the Executive Order of the President. The question then is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive have constitutional authority to impose the curfew restriction here complained of (p. 91).[61]

The parallel between this case and the *Hirabayashi* case is precise. Here as there a contention is made of delegation of legislative power. Here as there, action was taken by executive officers of the Government which was said to be without proper congressional direction. Here as there, this executive action was brought to the attention of Congress and Congress thereafter passed a statute which constituted approval of the executive action. And accordingly, here as there, no question of delegation of legislative authority remains open. Whatever difficulties may be found in the original act, the amendments of October 21, 1942, merged the detailed administrative practice with the statute in a manner to foreclose all possibility of further doubt.[62]

Appellants' contention of unlawful delegation of legislative power cannot be supported either by principle or by precedent.

---

[61] Accord: *United States* v. *Von Clemm*, 136 F. (2d) 968 (C. C. A. 2, 1943), cert. den. 64 S. Ct. 81. For other cases recognizing that reenactment of a law ratifies the administrative practice see *Latimer* v. *United States*, 223 U. S. 501, (1912); *Hecht* v. *Malley*, 265 U. S. 144 (1924); *Sessions* v. *Romadka*, 145 U. S. 29, 42 (1892).

[62] Appellants' brief criticizes Sec. 403 (d) of the Act which provides that in determining excessive profits, no allowance shall be made for salaries "in excess of a reasonable amount" or for "excessive reserves" or for costs which are "excessive and unreasonable." These determinations are, of course, incidental to the final determination of excessive profits and all the reasons which justify administrative flexibility in reaching the ultimate conclusion justify the same flexibility in deciding these subordinate matters. Furthermore, long established tax practice makes it clear that there is nothing unlawful in a delegation to administrative officials to determine the reasonableness of salaries, costs and reserves. Sec. 23 of the Internal Revenue Code provides deductions from gross income. As every taxpayer knows, these deductions are reviewed and redetermined by the Commissioner of Internal Revenue. The authorized deductions include:

(A) "All the *ordinary* and necessary expenses * * *."

(k) Worthless debts "or a *reasonable* addition to a reserve for bad debts."

(l) "A *reasonable* allowance" for depreciation "(including a *reasonable* allowance for obsolesence)."

Furthermore Section 403 (c) (3) of the Act directs that the Secretaries

4. Renegotiation as the administrative recapture of excessive profits

The Renegotiation Act is the legislative formulation of the voluntary practice worked out by the business community and the Services to eliminate excessive profits. That practice, as it developed prior to the statute, had two aspects. If the contracts under which the excessive profits were accruing were, on the date of review, still in operation, reductions in the contract price were frequently effected. If, however, deliveries under the contracts had terminated and full payment had been made to the contractor in accordance with the contract terms, the elimination of the excessive profits required a cash refund to the Government. It is this latter practice which, somewhat inaccurately, has been termed "renegotiation." As a matter of actual operation, renegotiation does not involve any modification of contract prices. On the contrary, the statute contemplates and requires not a reconsideration of prices but the consideration of profits, total profits on all war business. If those profits are excessive, a refund is demanded without regard to contract prices. The Government in this case has undertaken to do no more than to require a cash refund of excessive earnings; there has been no modification of or tampering with contractual obligations. What has happened is that profits of appellants in the hands of appellants have been found to be excessive and a refund has been demanded. The order of the Under Secretary does not refer to or direct the modification of any contract price.

It should be noted, furthermore, that the demand for a refund of excessive war profits is entirely lawful regardless of the date of the subcontracts; and hence even if it were shown on this record, which it is not, that some of appellants' subcontracts included in renegotiable business were made before April 28, 1942, the result would not be affected. There is no principle of law which frees from the operation of an Act of Congress profits realized on contracts executed before the date

---

shall be guided by the provisions of the Internal Revenue Code. Those provisions, among the most detailed in the law, are certainly an adequate guide to administrative action. If they were not every Revenue Act would for that reason be unconstitutional.

of the statute. This is illustrated by all tax legislation since every Revenue Act in some way reaches profits realized on contracts executed prior to the date of the Act.

(a) *Taxation of earnings realized on contracts executed prior to the Revenue Act.*—That taxation of profits derived from contracts antedating the revenue act is lawful was recognized at least as early as 1830. In *Providence Bank* v. *Billings,* 4 Pet. 514 (1830), Mr. Chief Justice Marshall said:

> Land, for example, has, in many, perhaps, in all the states, been granted by government, since the adoption of the constitution. This grant is a contract, the object of which is that the profits issuing from it shall inure to the benefit of the grantee. *Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all; and the proposition appears so extravagant, that it is difficult to admit any resemblance in the cases* (p. 561).

There has been no dissent from this conclusion. On the contrary, on every occasion when the question has been presented to the Supreme Court the Court has ruled in favor of the power to tax. For example, in *Kehrer* v. *Stewart,* 197 U. S. 60 (1905), Georgia levied a tax on agents of packing houses doing business in the state. It was contended that the tax was unconstitutional because it reduced earnings under an employment contract executed before the date of the statute. In dismissing this contention the Court said:

> *The argument that the tax impairs the obligation of a contract between the petitioner and Nelson Morris & Company is hardly worthy of serious consideration. The power of taxation overrides any agreement of an employe to serve for a specific sum. His contract remains entirely undisturbed* (p. 70).

Again in *Barwise* v. *Sheppard,* 299 U. S. 33 (1936), it was held that an oil and gas lease, antedating the statute, could not in any way limit the power of the state to lay an excise tax on production of oil and to determine between the lessor and lessee who should pay the tax.

Additional decisions, each to the same effect, include *Chanler* v. *Kelsey,* 205 U. S. 466, 479 (1907); *Moffitt* v. *Kelly,* 218 U. S. 400, 404 (1910); *Lake Superior Mines* v. *Lord,* 271 U. S. 577 (1926); *United States Trust Company* v. *Helvering,* 307 U. S. 57, 60 (1939); and *Illinois Central Railway Company* v. *Minnesota,* 309 U. S. 157, (1940), in which Mr. Justice Douglas said:

> * * * liability for retroactive taxes is "one of the notorious incidents of social life" (p. 165).

The Government submits that if, as these cases demonstrate, there is no constitutional objection to the recapture of earnings on pre-existing contracts by an exercise of the tax power there certainly can be no objection to the recapture of excessive war profits on pre-existing contracts by an exercise of the much broader war power. This is not to say that renegotiation is taxation. Renegotiation is not taxation. It has never been so considered by Congress or anyone else who gave serious thought to the question. Renegotiation is not undertaken primarily to provide revenue to the Government; it is undertaken as a war measure because the control of war profiteering is an essential feature of a successful war program. The Renegotiation Act is not a tax measure any more than the Transportation Act of 1920, calling as it did for payment of excessive earnings to the United States, was a tax measure. *Dayton-Goose Creek Railway* v. *United States,* 263 U. S. 456 (1924). But the tax cases do demonstrate that there is nothing in the Constitution nor in any principle of constitutional law which can be said to exempt from governmental action profits earned on contracts antedating an act of Congress. The establishment of any such principle would not only be an unwarranted and unprecedented restriction on the war power of the Federal Government, but it would inevitably defeat the revenue policies of the United States and repudiate principles and practices which have been accepted for more than a hundred years.

(b) *Congressional modification of existing contracts.*—Renegotiation conducted by way of a demand for a cash refund does not call for modification of contract obligations. It calls for the regulation of war profiteering by recapture, through ad-

ministrative action, of excessive profits on total war business. Strictly speaking there is, therefore, no occasion to consider the power of the Government to modify contractual obligations. However, there is no doubt that the Government does have that power. The power of the Federal Government to modify contracts between private persons in order to achieve a legitimate national objective has always been recognized by the Supreme Court. The classic statement of the rule is by Mr. Chief Justice Hughes in *Norman* v. *B. & O. R. Co.*, 294 U. S. 240 (1935):

> *Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them* (pp. 307–308).

Similar expressions are found in *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398, 434, 438 (1934).

> Not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interest of its people. *It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." Stephenson* v. *Binford*, 287 U. S. 251, 276, 53 S. Ct. 181, 189, 77 L. Ed. 288.
>
> * * * * *
>
> The argument is pressed that in the cases we have cited the obligation of contracts was affected only incidentally. This argument proceeds upon a misconception. *The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.*

The illustrations could be multiplied indefinitely. See, for example, Mr. Justice Holmes in *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 357:

> *One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.* The contract will carry with it the infirmity of the subject matter.

Mr. Justice Harlan in *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, 482 (1911):

> *The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable.*

And Mr. Justice Van Devanter in *Producers Transp. Co.* v. *R. R. Comm.*, 251 U. S. 228, 232 (1920):

> *That some of the contracts before mentioned were entered into before the statute was adopted or the order made is not material.*

This principle, that rights established by preexisting contracts are subject to regulation designed to further legitimate national objectives, has been recognized over and over again by the Supreme Court. In addition to the cases cited above see *Faitoute Co.* v. *Asbury Park*, 316 U. S. 502 (1942) (state regulation of insolvent municipalities); *Overnight Motor Co.* v. *Missel*, 316 U. S. 572 (1942) (Congressional regulation of wage rates); *Henderson Co.* v. *Thompson*, 300 U. S. 258 (1937) (state regulation of use of natural gas); *Stephenson* v. *Binford*, 287 U. S. 251 (1932) (state regulation of charges of motor carriers); *Dillingham* v. *McLaughlin*, 264 U. S. 370 (1924) (state regulation of small loan business); *New York* v. *United States*, 257 U. S. 591 (1922) (Congressional regulation of railroad

fares); *Block* v. *Hirsh*, 256 U. S. 135 (1921) (Congressional regulation of rents); *Thornton* v. *Duffy*, 254 U. S. 361 (1920) (state compensation laws); *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211 (1899) (Congressional regulation of combinations in restraint of trade); *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746 (1884) (state slaughterhouse regulation); *Stone* v. *Mississippi*, 101 U. S. 814 (1879) (state regulation of lotteries); *Beer Co.* v. *Mass.*, 97 U. S. 25 (1877) (state regulation of the manufacture of liquors).

That the war program required that the Renegotiation Act be made applicable to contracts and subcontracts existing on April 28, 1942, has been explained. On that date there were outstanding procurement commitments by the United States in an amount in excess of $50,000,000,000.00. The renegotiation program if it was to be successful had to reach profits realized on these early contracts executed without production experience and when the emergency of the nation was the greatest and the demand for war material at any price the most urgent. The action of Congress in making profits realized on contracts existing on April 28, 1942, subject to the statute was compelled in order to control war profiteering, just as the control of war profiteering was compelled in order to achieve success in the war program. The power of Congress to enact a war program adequate to preserve the nation cannot be defeated by the action of private parties in entering into contracts.[63]

[63] Appellants had no government contracts and accordingly no question is now presented as to the power of the Government to modify or recapture the profits from its own contracts. *Lynch* v. *United States*, 292 U. S. 571 and *Perry* v. *United States*, 294 U. S. 330 can therefore have no application here. The distinction made in the gold clause cases between modification of the provisions of a Government Liberty Bond and modification of bonds of a private corporation may, when the question is presented, require special attention to Government contracts. It is the Government's position (a) that a procurement contract is by its very terms a fluid arrangement that contemplates such modification as may be necessary to achieve fairness; (b) that *Perry* v. *United States*, 294 U. S. 330 (1935), relates to the borrowing power of the Federal Government and the status of the public debt rather than to regulation of ordinary contractual obligations; (c) that the war power overrides any and all contracts since it is inconceivable that Congress can bargain away its power to preserve the existence of the nation; and (d) that in any event the administrative recapture of excessive profits does not involve any modification of contract provisions.

5. Provision for notice and hearing

It is suggested that the Act is unconstitutional because it does not expressly require a hearing before a determination is made that excessive profits have been realized. This suggestion is wide of the mark for several reasons:

First, it fails to recognize that the statute requires "renegotiation." The term "renegotiation" obviously implies meetings and conferences with the contractor and, as paragraph 46 of the Patterson affidavit explains (R. 91), the Services have been exceedingly careful to give contractors every opportunity to present evidence and argument.

Second, as the order of the Under Secretary demonstrates (R. 7) a hearing was in fact given to appellants and when a hearing has in fact been granted the presence or absence of an express statutory requirement for hearing becomes immaterial. *Detroit Ry.* v. *Osborn*, 189 U. S. 383, 391 (1903).[64]

Third, there is no constitutional requirement that every statute provide expressly for a hearing. If under the circumstances due process requires a hearing, the Constitution itself protects the litigant; and if, on the other hand, due process does

---

[64] For additional cases recognizing that a systematic practice of administrative hearings, even though not expressly required by the statute, satisfies due process requirements see the decisions sustaining the rationing provisions of the Second War Powers Act and particularly *Stewart & Bro.* v. *Bowles*, 322 U. S. 398, 401 (1944); *Walter Brown & Sons* v. *Bowles*, 58 F. Supp. 323 (1944); *Country Garden Market* v. *Bowles*, 141 F. (2d) 540 (D. C. App. 1944) cert. den. 322 U. S. 752.

Coe v. *Armour Fertilizer Works*, 237 U. S. 413 (1915) is a different case. A Florida statute authorized a judgment creditor of a corporation to levy execution on the property of a shareholder without notice to the shareholder. A levy was made on the property of Coe, who filed a petition to quash the execution. The Supreme Court held that the statute "thus construed, *and as applied to this case*," was contrary to due process because no provision was made for notice to and hearing of the shareholder. The significant feature of this case is that the Florida statute *and the practice under the statute* would permit execution upon and sale of a shareholder's property without notice to him unless, as in the case of *Coe*, he obtained notice by accident—and the court pointed out that this accidental or casual notice was not a substitute for official notice. The situation with respect to renegotiation is entirely different: (a) because the statute itself speaks of "renegotiation" which plainly implies and has been interpreted to imply meetings with the contractor, and (b) because the official practice gives full notice and hearing (R. 91).

not require a hearing, obviously Congress is not obligated to provide for one. The rationing provision of the Second War Powers Act says nothing about a hearing and, as has been pointed out, the validity of the statute is now settled. For another illustration see 39 U. S. C. A. 259, the statute pursuant to which the Postmaster General issues fraud orders.[65]

Fourth, appellants cannot complain since the statutory right to be heard for which they contend was accorded them by the Revenue Act of 1943, which became effective February 25, 1944, only three weeks after the Under Secretary determined the amount of their excessive profits. Section 403 (e) (2) of Title VII specifically provided that all persons in the position of appellants should have ninety days after February 25, 1944, to apply to the Tax Court for a de novo redetermination of the amount, if any, of their execssive profits. By incorporating sections of the Internal Revenue Code provision was made in the statute for traditional Tax Court notice and hearing, notice and hearing of the kind a litigant receives in a District Court of the United States. Since appellants did not go to the Tax Court when the opportunity was made available obviously they were not injured by, nor can they now complain about, any supposed deficiency in the original act.[66]

---

[65] For further illustrations of statutes authorizing administrative action without making specific requirement for a hearing see *Field* v. *Clark*, 143 U. S. 649 (1892); *Buttfield* v. *Stranahan*, 192 U. S. 470 (1904); *United States* v. *Grimaud*, 220 U. S. 506 (1911); *McKinley* v. *United States*, 249 U. S. 397 (1919).

[66] Appellants suggest on page 65 of their brief that prior to the amendments of February 25, 1944, the statute expressly provided against judicial review. Appellants are in error. Sec. 403 (c) (4) to which they refer has to do only with the degree of finality that attaches to agreements signed by the Government and the contractor, closing agreements similar to those authorized by section 3760 of the Internal Revenue Code. Appellants signed no such agreement. Prior to February 25, 1944, the statute said nothing about review of an order such as the order entered in this case. Compare *Stark* v. *Wickard*, 321 U. S. 288 (1944) and *Stewart & Bro.* v. *Bowles*, 322 U. S. 398, 403 (1944). See also *Carter* v. *Bowles*, 56 F. Supp. 278, 282:

"The validity of the statute and the regulations promulgated thereunder are attacked on the ground that no provision is made by the statute itself for judicial review of the administrative action taken pursuant thereto. It is well settled, however, that without special statutory provisions therefor, the courts of the United States may, in the exercise of jurisdiction conferred

6. Finality of Tax Court determinations of amount

It is argued that the provision of the Act making final Tax Court determinations of amount offends the rule of *Ex parte Young,* 209 U. S. 123 (1907). That case condemns a statute which imposed "fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation * * *." There are no such fines or penalties imposed by the Renegotiation Act and the opportunity to test the validity of the legislation is entirely unrestricted—as this case demonstrates. The Renegotiation Act does not deny access to the courts. It says only that on questions of amount—not on constitutional or other questions—the conclusion of the expert body, the Tax Court, shall be final. This does not differ from many other provisions for administrative finality [67] and never has it been held that such provisions offend the rule of *Ex parte Young.* On the contrary, it is recognized that the language of the statute must be read with the Constitution and the courts will grant such judicial action as the Constitution requires. *Crowell* v. *Benson,* 285 U. S. 22 (1932). Furthermore, since plaintiff has not invoked the Tax Court remedy he has not been injured by, and accordingly he cannot debate here, the validity of the provision making the Tax Court decision on amount questions

---

upon them by general statutory provisions, enjoin the enforcement of orders of executive agencies to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted power. *Stark* v. *Wickard,* 321 U. S. 288, 64 S. Ct. 559, 571. This, of course, accords judicial review to the extent necessary to protect constitutional rights; and such review plaintiff is receiving in the suit presently before the court."

[67] See, as examples, *Crane* v. *Hahlo,* 258 U. S. 142 (1922) approving a New York statute which provided that an award by a board of assessors of damages from street construction "shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained"; *Hilton* v. *Merritt,* 110 U. S. 97 (1884) and *Passavant* v. *United States,* 148 U. S. 214 (1893) sustaining provisions making valuation determinations of customs officials final; and *United States* v. *Ju Toy,* 198 U. S. 253 (1905) and *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320 (1909) upholding the finality of executive action in connection with immigration matters. Compare *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551 (1928) and *Heiner* v. *Diamond Alkali Co.,* 288 U. S. 502 (1933) denying judicial review of Board of Tax Appeals decisions on excess profit questions arising from the hardship sections of the Revenue Act of 1918.

final. *Voeller* v. *Neilston Co.*, 311 U. S. 531, 573 (1940); *Tyler* v. *Judges*, 179 U. S. 405 (1900); *Hendrick* v. *Maryland*, 235 U. S. 610 (1914).

7. The attack on the order

(a) *The order has become final and is now free from attack.*— This failure to take advantage of the Tax Court right of redetermination forecloses any objection to the terms of the order of the Under Secretary of War. After ignoring the right to de novo reconsideration appellants cannot object to formal or technical defects, real or imaginary, in a decision which was sufficiently fair that they were unwilling to ask for redetermination. In American courts failure to appeal waives all objections to the original adjudication; it does not preserve for collateral attack technical deficiencies which would have been remedied by the reviewing tribunal.

Since appellants failed to take advantage of an opportunity for de novo redetermination of the amount of their excessive profits in a forum whose procedures assure fair hearings and fair decisions [68] appellants have in law accepted the order of the Under Secretary. This is, of course, a familiar rule, as familiar as the rule that the failure to appeal from a judgment renders that judgment immune from collateral attack.

---

[68] *Dobson* v. *Commission*, 320 U. S. 489, 498 (1943):

"The court [the Tax Court] is independent, and its neutrality is not clouded by prosecuting duties. *Its procedures assure fair hearings.* Its deliberations are evidenced by careful opinions. All guides to judgment available to judges are habitually consulted and respected. It has established a tradition of freedom from bias and pressures. It deals with a subject that is highly specialized and so complex as to be the despair of judges. It is relatively better staffed for its task than is the judiciary. Its members not infrequently bring to their task long legislative or administrative experience in their subject. The volume of tax matters flowing through the Tax Court keeps its members abreast of changing statutes, regulations, and Bureau practices, informed as to the background of controversies and aware of the impact of their decisions on both Treasury and taxpayer. Individual cases are disposed of wholly on records publicly made in adversary proceedings, and the court has no responsibility for previous handling. Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts, Consideration of uniform and expeditious tax administrations require that they be given all credit to which they are entitled under the law."

The principle is given general application by the courts. If, for example, a tax is assessed in an amount that is claimed to be unreasonable and by procedures that are claimed to be arbitrary and the taxpayer fails to take advantage of administrative procedures for redetermination, the original assessment becomes final and beyond attack.

Utley v. *St. Petersburg,* 292 U. S. 106, 109 (1934):

> This court will not listen to an objection that the charge has been laid in an arbitrary manner when an administrative remedy for the correction of defects or inequalities has been given by the statute and ignored by the objector (p. 109).

Milheim v. *Moffat Tunnel District,* 262 U. S. 710 (1943):

> It is contended that the Commission arbitrarily adopted an *ad valorem* basis of appraisal for the apportionment of benefits to the several parcels of land within the District without reference to the actual benefits to each. This argument erroneously assumes that the Commission had finally adopted such an *ad valorem* basis for its appraisal. This is not the case. It had merely adopted a tentative *ad valorem* basis, subject to modification and corrections, before final confirmation, after the hearing of objections filed by landowners; of which public notice was given. These landowners did not seek to have the Commission modify or correct this tentative basis of apportionment or file any objections to the appraisal of benefits to their properties. Presumably if the tentative appraisal was made on an erroneous basis it would have been modified upon a proper showing. *Having failed to object to the tentative ad valorem basis adopted by the Commission or to appear before it for the purpose of obtaining modifications or corrections as to their lands before the final adoption of such basis, they have here no sufficient ground of complaint.* Where a city charter gives property owners an opportunity to be heard before a board respecting the justice and validity of local assessments for proposed public improve-

> ments and empowers the board to determine such complaints before the assessments are made, parties who do not avail themselves of such opportunity cannot be heard to complain of such assessments as unconstitutional. *Farncomb* v. *Denver,* 252 U. S. 7, 11 (pp. 723–724).

This rule applies generally to all administrative orders and determinations. A failure to take advantage of administrative or statutory methods for review renders the administrative order immune from attack.[69] Examples of orders held to have become final through failure to take advantage of special review procedures, include:

(a) A reparation order issued by the Secretary of Agriculture under the Perishable Agriculture Commodities Act.

Abe Rafelson Co. v. *Tugwell,* 79 F. (2d) 653 (C. C. A. 7, 1935):

> Having failed to pursue its remedy provided by this amendment, wherein it could have, in the District Court, raised all proper questions, including the validity of the challenged sections, we will not now consider their constitutionality (p. 655).

(b) An order of the Secretary of Agriculture fixing fees under the Packers and Stockyards Act.

Inghram v. *Union Stock Yards Co.,* 64 F. (2d) 390 (C. C. A. 8, 1933):

> Such order cannot be attacked by a defense to collection of charges which are in compliance with an order of the Secretary (p. 392).

(c) An order of the Secretary of Agriculture requiring payments into a milk settlement fund under the Agriculture Marketing Agreement Act of 1937.

---

[69] Compare the rule forbidding consideration of a contention that carrier tariffs filed with the Interstate Commerce Commission are unreasonable and unlawful in a criminal action charging failure to comply with the tariffs. *Lehigh Valley R. Co.* v. *United States,* 188 Fed. 879 (C. C. A. 3, 1911); *United States* v. *Vacuum Oil Company,* 158 Fed. 536 (D. C., W. D., N. Y., 1908).

United States v. *Ridgeland Creamery Co.*, 47 F. Supp. 145 (D. C. W. D. Wis., 1942):

> Where, as here, Congress has created a special administrative procedure providing for a review by the Secretary of Agriculture of the United States of actions and determinations of the Market Administrator, and which, as here, meet all requirements of due process, that remedy is exclusive, *and this court has no jurisdiction to review the actions and determinations of the Market Administrator,* except in proceedings under Section 8c (15) (B) of the Agricultural Marketing Agreement Act of 1937 (p. 149).

(d) An order of the Securities and Exchange Commission passing on the validity of security transactions.

Berg v. *Cincinnati, Newport & Covington Ry.*, 56 F. Supp. 842 (1944):

> Since the first two of these claims have been passed upon by the Securities and Exchange Commission I must hold as a matter of law that this court cannot consider them further (p. 848).

(e) An order of the Federal Power Commission licensing the construction of a power project.

Harris v. *Central Nebraska Public Power & Irr. Dist.*, 29 F. Supp. 425 (D. C. D. Nev., 1938):

> The license granted was in accord with the law. It was within the power of the Commission. It was issued after a showing made, and findings of fact duly entered. *May this Court, given no jurisdiction in the Act itself to review, in this collateral proceeding now try the matter de novo? We think not, and so hold* (p. 428).

(f) An order of the Administrator of the Wage and Hour Division of the Department of Labor fixing wage rates under the Fair Labor Standards Act of 1938.

Walling v. *Cohen*, 48 F. Supp. 859 (1943), affirmed 140 F. (2d) 453:

> Not having challenged the validity or applicability of the wage orders before the Administrator or the Cir-

cuit Court of Appeals, despite notice that those orders included hat manufacturing operations, defendants cannot cast upon the plaintiff in this proceeding for the enforcement of those orders the burden of establishing the scope of the investigation leading to their promulgation (p. 863).

(g) A cease and desist order of the Federal Trade Commission.

United States v. *Piuma,* 40 F. Supp. 119 (1941), affirmed 126 F. (2d) 601, cert. den. 317 U. S. 637.

> Considering the scheme of the statute in its entirety, it is apparent that the defendant is not entitled thereunder to a trial in this court on facts determined by the Commission. *Defendant's opportunity to challenge the Commission's findings was lost when he failed to petition for review prior to May 20, 1938.* Giving finality to the order of the Commission when the defendant has the right of appeal is consonant with due process. *Shields* v. *Utah Idaho Cent. R. Co.,* 305 U. S. 177, 59 S. Ct. 160, 83 L. Ed. 111 (p. 122).

As these cases demonstrate the courts have not hestitated to attach finality to administrative orders where interested or aggrieved persons have failed to exercise appeal privileges. The rule forbidding collateral attack on orders which have thus become final is, of course, essential to the orderly administration of justice. If after ignoring special review procedures a litigant can challenge an administrative order in any court under any circumstances, all special procedures provided by Congress become interesting but futile gestures toward the more intelligent handling of litigation. Unless litigants are required to exercise their rights in special tribunals or abide the consequence, every attempt by Congress to improve government by the use of expert tribunals and procedures specially adapted to the particular problem will be defeated at the outset.

The failure of the appellants to seek relief in the Tax Court was a decision to accept the conclusion of the Under Secretary that excessive profit of $110,000.00 had been realized. Appellants must abide by that decision.

(b) *Findings of fact.*—Even if the order were now subject to attack there is no basis on which that attack might be made. The order itself demonstrates that appellants received fair treatment. It points out that appellants hold contracts subject to renegotiation; that renegotiation took place pursuant to the provisions of the Act; that the Under Secretary considered financial, operating, and other data submitted by appellants or obtained from reliable sources; that appellants were granted full oportunity to submit additional information and to present their contentions at hearings of which due notice was given; that consideration was given to the information furnished and the contentions presented; and, finally, that it was determined that $110,000 of the profits (subject to tax credit) realized by appellants on renegotiable business during the fiscal year ending December 31, 1942, were excessive. Bearing in mind the opportunity for Tax Court de novo redetermination it is difficult to see how more could be asked of the Under Secretary.

It is true that there are in the order no detailed findings of evidentiary facts.[70] There is neither an occasion for nor a

[70] Appellants' brief suggests but does not argue that the *statute* is void because it does not by its terms expressly require that findings of fact be made. There is no rule of law that every statute must, on peril of offending the Constitution, contain an express requirement for findings of fact. Such a rule would invalidate most of the more important Congressional legislation. (See the monographs accompanying the report of the Attorney General's Committee on Administrative Law.) The cases cited by plaintiff, *Mahler* v. *Eby*, 264 U. S. 32, 44 (1924), and *Wichita R. R.* v. *Public Utilities Commission*, 260 U. S. 48, 58 (1922), are concerned not with the validity of a statute but with the validity of an administrative order and they condemn the order because of a failure to include findings which the statute specifically required. In the *Panama Refining* case, Mr. Chief Justice Hughes was not suggesting that the Constitution required that Congress insert in each statute a demand for findings; he was only pointing out that the act before him contained nothing, neither a statement about findings nor anything else, from which Congressional policy could be determined. In any event, this Court has expressly approved a statute which says nothing about findings of fact. *Rogge* v. *United States*, 128 F. (2d) 800 (C. C. A. 9, 1942), cert. den. 317 U. S. 656, and the Supreme Court has taken the same action on many occasions. See, for example, *McKinley* v. *United States*, 249 U. S. 397 (1919); *United States* v. *Grimaud*, 220 U. S. 506 (1911).

requirement of such findings.[71] Detailed findings are useful only if review of the decision is confined to determining whether there is evidence to support the findings. Here there is no review of the Under Secretary's conclusion but a redetermination de novo. Under such circumstances, a requirement for detailed findings would only impose on the Services an onerous task which could serve no useful purpose.[72] In any event, this Court has definitely and specifically rejected appellants' contention. In *Rogge* v. *United States,* 128 F. (2d) 800 (C. C. A. 9, 1942) cert. den. 317 U. S. 656 this Court said:

> Appellants also urge that the road regulation is invalid because the Secretary made no finding of fact that the public interest necessitated the toll, citing *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 431–433, 55 S. Ct. 241, 79 L. Ed. 446. The situation is controlled by the later Supreme Court decisions holding that "It is settled that to all administrative regulations purporting to be made under authority legally delegated there attaches a presumption of the existence of facts justifying the specific exercise." *Thompson* v. *Consolidated Gas Co.,* 300 U. S. 55, 69, 57 S. Ct. 364, 371, 81 L. Ed. 510; *Pacific States B. & B. Co.* v. *White,* 296 U. S. 176, 185, 56 S. Ct. 159, 80 L. Ed. 138, 101 A. L. R. 853.

(c) *Consideration of materials beyond the record.*—The suggestion that the order discloses a violation of the rule of *Ohio Bell Telephone Co.* v. *Public Utilities Comm.,* 301 U. S. 292 (1937) is in error. That case holds that the final conclusion of a rate-making body must be based on the record

---

[71] The order of the Under Secretary contains as much detail as the orders quoted by the Supreme Court in *Hampton & Co.* v. *United States,* 276 U. S. 394, 403 (1928), and *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 312 (1936).

[72] The letter sent by appellants' attorneys to the Secretary of War (R. 215) was a request for information made, as the letter states, pursuant to Sec. 701 of the Revenue Act of 1943. The reply points out quite correctly that Congress did not make the Sec. 403 (c) (1) retroactive and the Board declined to give the statute a retroactive effect when Congress had not so provided. Appellants' letter, furthermore, was written two months *after* the Under Secretary reached his conclusion and a month after appellants had been granted the right to de novo proceedings in the Tax Court.

in the particular case, not on materials which are otherwise relevant but which are not in the record. There is nothing whatever to indicate any contrary practice by the Under Secretary. The order points out that the Under Secretary considered data relating to appellants' profits which was submitted by appellants or obtained from governmental or other reliable sources. It goes on to say that appellants were granted full opportunity to submit additional information and to present their contentions, and there is nothing to indicate that during the course of the negotiations appellants requested and were refused access to anything in the record. Surely appellants cannot insist that the Government close its eyes to all data except that produced by them.

However, the significant fact is that the determination of the Under Secretary was not, unless appellants chose to make it so, the final determination. The cases which appellants cite all relate to final orders. As the opinion in the *Ohio Bell* case points out neither that decision nor appellants other cases have application where as here further de novo administrative proceedings are contemplated.[73] On the contrary, it is recognized that due process requires no more than one opportunity to be heard and if that opportunity is available preliminary action need not meet any formal requirements. In ordinary tax practice assessments are made and deficiencies asserted without notice and hearing and upon evidence known only to the collector. The courts recognize that if the taxpayer has an opportunity to be heard before the assessment becomes irrevocable due process is satisfied. *Utley* v. *St. Petersburg,* 292 U. S. 106 (1934),[74] and *McGregor* v. *Hogan,* 263 U. S. 234

[73] "We have pointed out elsewhere that under the statutes of Ohio, no provision is made for a review of the order of the Commission by a separate or independent suit. *West Ohio Gas Co.* v. *Public Utilities Comm'n* (No. 1), 294 U. S. 63, 68. A different question would be here if such a suit could be maintained with an intermediate suspension of the administrative ruling. * * * In Ohio the sole method of review is by petition in error to the Supreme Court of the State, which considers both the law and the facts *upon the record made below, and not upon new evidence*" (p. 303).

[74] The court said:

"There is no constitutional privilege to be heard in opposition at the launching of a project which may end in an assessment. It is enough that a hearing is permitted before the imposition of the assessment as a charge

(1923).[75] A tentative valuation of property for rate-making purposes may be made ex parte. *Delaware & Hudson Co.* v. *United States,* 266 U. S. 438 (1925). And provisional rates may be placed in operation. *The New England Divisions Case,* 261 U. S. 184 (1923). Preliminary appraisals of property for eminent domain purposes without a hearing are constitutional. *Bragg* v. *Weaver,* 251 U. S. 57 (1919).[76] And compare the cases sustaining summary destruction of foodstuffs. *Adams* v. *Milwaukee,* 228 U. S. 572 (1913); *North American Storage Co.* v. *Chicago,* 211 U. S. 306 (1908); *Lawton* v. *Steele,* 152 U. S. 133 (1894). If under the Constitution the very fundamentals of due process, notice and hearing, can be disregarded in making the preliminary determination, it is self-evident that there can be no technical and formal requirements as to the language of the order.

In any event and for the reasons and upon the authority heretofore set forth appellants' failure to seek the relief to which they were entitled in the Tax Court forbids consideration now of any contention addressed to the validity of the order entered by the Under Secretary.

---

upon the land (*Chicago, M., St. P. & P. Ry Co.* v. *Risty,* 276 U. S. 567; *Londoner* v. *Denver,* 210 U. S. 373, 378; *Goodrich* v. *Detroit,* 184 U. S. 432, 437), or in proceedings for collection afterwards." (p. 109)

[75] The opinion points out:

"The requirement of due process is that after such notice as may be appropriate the taxpayer have opportunity to be heard as to the amount of the tax by giving him the right to appear for that purpose at some stage of the proceedings before the tax becomes irrevocably fixed. *Turner* v. *Wade, supra,* p. 67. And see *Londoner* v. *Denver,* 210 U. S. 373, 385.

"*And since this act, although not providing for notice and hearing before the assessment by the Board of Assessors, grants the taxpayer after due notice the right to a hearing before arbitrators who shall finally assess and fix the valuation of his property, we find in its provisions no want of that notice and hearing which is essential to due process*" (p. 237).

[76] The court said:

"But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard. Among several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court carrying with it a right to have the matter determined upon a full trial. *United States* v. *Jones,* 109 U. S. 513, 519; *Backus* v. *Fort Street Union Depot Co., supra,* p. 569. *And where this mode is adopted due process does not require that a hearing before the viewers be afforded, but is satisfied by the full hearing that may be obtained by exercising the right to appeal*" (P. 59).

> The burden, therefore, is, and properly should be, upon an interested person to act affirmatively to protect himself.

Red River Broadcasting Co. v. *Federal Communications Comm.*, 98 F. (2d) 282, 286 (D. C. App., 1938).[77]

CONCLUSION

In considering appellants' contentions and in measuring the Renegotiation Act against the Constitution it is well to bear in mind that the United States is not, as it is in the Selective Service Act, asserting power over the person of its citizens. It is not even, as in the wartime revenue acts, taking an increased percentage of normal earnings. It is only saying on behalf of the public that public peril shall not be private good fortune, that no citizen shall at public expense increase his personal profit from public disaster, that the common misfortune of war shall not be the occasion for conferring on a special group unreasonable, excessive and abnormal rewards. Reduced to its bedrock terms a challenge to the Renegotiation Act on constitutional grounds is the assertion that the Constitution protects earnings inflated by war; that the abnormal gains arising from a national calamity are by the Constitution made immune from public control. This is shocking doctrine. It is not only a reading of the Constitution to prevent Congress from waging war in the manner most likely to achieve the quickest and least costly victory, it is to give constitutional protection to that which of all things is least worthy of constitutional protection. This surely is abuse of constitutional government.

---

[77] The difficulty of appellants' position in attempting to attack the Under Secretary's order is illustrated by the footnote on page 7 of appellants' brief. Appellants point out that "the complaint did not raise any question as to whether the amount of the alleged excessive profits was correct, neither did it seek any redetermination thereof." This would appear to be a confession that appellants are debating not the substance of the Under Secretary's order but merely its form, not facts but language, not substantial rights but technical formalities. The Constitution, however, does not prescribe rituals nor dictate record arrangements. It is addressed only to matters of substance—matters with which appellants are apparently not concerned.

It is the fashion to meet every statute based upon the war power with the cry war does not repeal the Constitution. That is true. No contrary contention has been or will be made by the Government in this case. The Constitution is the charter of government both in time of peace and in time of war, in time of national peril and in time of national safety. But the recognition of this fact does not require that the war power be entirely read out of the Constitution or that this case be approached as though Congress had no independent war power but must wage war by straining at the more conventional peacetime powers, subject to judicial correction whenever peacetime conceptions are ever so slightly infringed. This brief and the Government's case take the middle ground: that there is in the Federal Government an independent war power having limits under the Constitution appropriate to that power and that the Renegotiation Act is well within those limits.

It may well be, and it is altogether probable, that renegotiation and recapture of excessive war profits can be sustained without reference to the broad mandate of the Constitution that the Federal Government shall and must wage war in a manner that will preserve the nation. Certainly it is fair to conclude that no serious challenge of the statute is made in this case even under the most restricted peacetime conception of the Constitution. The statute comes before the court replete with provisions to protect contractors and to assure fair treatment of all aggrieved persons. It is the product of the most careful Congressional consideration. Rarely has the operation of legislation been so carefully watched, so widely discussed; rarely have hearings on the disputable points been so extensive; rarely has there been such a studious effort to establish fair administrative procedures designed to protect public and private interests alike; and rarely has there been such a high degree of administrative success. The fact that in over 97% of the renegotiations the Government and the contractors have reached agreement has an eloquence and a significance that no amount of debate about real or supposed rules of law can obscure. The Renegotiation Act is not the product of a triumphant majority bent on establishing as

law a debatable policy. It is the joint product of the Services and their supplies, the American public. It is good business and fair dealing given the stamp of Congressional approval and the force of law.

But all this, significant as it is, does not reach the heart of the matter. There is in the end a single fact from which there is no escape and around which this case and all similar cases must turn—the fact that the Renegotiation Act was a war measure of first importance to victory. Congress concluded, as it could not avoid concluding, that success in war requires the elimination of war profiteering and that this must be done without impeding the rapid procurement of supplies, equipment, and weapons. This renegotiation has accomplished; every proposed substitute has been proved a failure.

Respectfully submitted.

JOHN F. SONNETT,
Assistant Attorney General.
CHARLES H. CARR,
United States Attorney.
RONALD WALKER,
ROBERT E. WRIGHT,
Assistant United States Attorneys.

Of Counsel:
WALKER LOWRY,
A. MORRIS KOBRICK,
Attorneys, Department of Justice.

U. S. GOVERNMENT PRINTING OFFICE: 1943